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## **THESIS**

**THE FAR PART 15 REWRITE POLICY AND ITS IMPACT  
ON FULL AND OPEN COMPETITION**

by

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June 1998

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OPEN COMPETITION**

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Submitted in partial fulfillment of the  
requirements for the degree of

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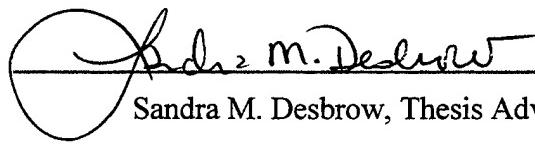
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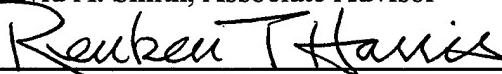
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## **ABSTRACT**

In 1997, the FAR Part 15 Contracting by Negotiation underwent a comprehensive rewrite. This thesis analyzed the major policies and influences that gave rise to these new rules, and determined the legislative and executive intent concerning its implementation. The key issues created or remaining unanswered by the new policy were identified and analyzed to determine their likely affect on competition in the competitive negotiation process. Similarly, the advantages and disadvantages of the Rewrite at the working level for both Government and industry were discussed. From the research, it was determined that competition is unlikely to suffer from the new policy, and in fact, is expected to increase due to lower Bid and Proposal (B & P) costs and more commercial-like processes that will lower barriers to entry. The Federal procurement process will benefit not only from lower prices and reduced acquisition costs, but should also enjoy dramatically reduced procurement cycle time. In terms of possible negative affects, industry is somewhat uncertain about the fair and equitable application of the new rules. The ability to reduce the competitive range for efficiency and "communications" are seen as actions demanding a high degree of contracting officer judgment and fairness. The research methodology could be used to analyze the impact of other legislative or executive policy on implementation at the working level.



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## **I. INTRODUCTION**

Acquisition reform strives to change many of the "old" ways of Government contracting: rigid rules, drawn-out bidding competitions, exhaustive audits, contentious appeals, etc. One of the fundamental initiatives of this ongoing reform is to change how Government agencies conduct contracting by negotiation.

The Federal Acquisition Regulation (FAR) Part 15 Contracting by Negotiation, details the procedures Government contracting officers must follow when negotiating contracts, and was rewritten to streamline and improve the process. On January 1, 1998, the FAR Part 15 Rewrite became mandatory for all Federal agencies.

This research will evaluate and analyze a policy that is one of the most significant reforms of the acquisition process, and assess its affect on the Competition in Contracting Act (CICA) requirement for full and open competition. The changes made by the Rewrite will significantly alter Government contracting, and are expected to generate a variety of problems and protests regarding the new rule's employment.

### **A. RESEARCH QUESTIONS**

#### **1. Primary**

What is the intent of policymakers in implementing the FAR Part 15 Rewrite, and what is industry's viewpoint of the policy and its impact on competition when contracting with the Government?

**2. Subsidiary**

- a. What were the policies and influential factors that guided formulation of the new rules?
- b. What were the major changes to the FAR Part 15 with regard to competition?
- c. What are the key issues and projected problems created by the FAR Part 15 Rewrite with regard to competition?
- d. What are the advantages and disadvantages—under the new rules—for a contracting officer\* in managing competition in the source selection process, and how can the disadvantages be mitigated?

**B. SCOPE**

This study is being conducted to assess the intent of the new policy as it affects competition, and to identify likely problems and protests as a result of implementation by Federal agencies. In doing so, the study will review the influences and genesis of CICA, which is the benchmark for policy concerning competition. After establishing CICA's role in acquisition policy, the study will then evaluate the evolution of the new rule.

Here, the study will review and assess the external environment and factors that stimulated much of the acquisition reform effort over the last ten years, particularly as applies to source selection. After establishing the external influences, the study will then

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\* Throughout this thesis, "contracting officer" is understood to mean the Government contracting officer.

determine legislative intent by reviewing the findings, recommendations, and requirements of the Packard Commission, the Defense Management Review (DMR), the National Performance Review (NPR), the Federal Acquisition Streamlining Act (FASA), a Secretary of Defense Procurement Process Action Team, and the Federal Acquisition Reform Act (FARA). This review of executive and legislative initiatives will provide the overarching intent of the policymakers in effecting these far-reaching changes.

The study will then analyze the key revisions that affect competition in the new Rewrite, and evaluate the major issues and problems involved with the reformed policy. After establishing the critical changes, an assessment of both industry's and contracting officers' views of the changes will be provided. This assessment will give invaluable insight into the new policy and its projected problems at the working level. Finally, the study will provide analysis and insight as to the likely impact of the new policy on contracting officers.

## **C. KEY DEFINITIONS AND TERMS**

### **1. Source Selection**

Source selection is the procedure by which the Contracting officer selects the source for the award; it is the process by which the Government evaluates a bid or proposal for the purpose of entering into a contract. [FAR 3.104-3] This study, however, will only be concerned with source selection as it applies to competitively negotiated acquisitions above the simplified acquisition threshold. Similarly, it will not apply to sole source awards, as this study centers around the impact on full and open competition.

## **2. Full and Open Competition**

The term "full and open competition" was established by CICA to mean that all responsible sources are permitted to submit bids or proposals on the procurement. Furthermore, 10 United States Code (U.S.C.) 2304 and 41 U.S.C. 253 state that contracting officers "will promote and provide for full and open competition" using procedures "best suited to the circumstances...and consistent with the need to fulfill the Government's requirements efficiently."

Full and open competition is a well-established mandate for Federal procurement, and there are only seven exemptions to its employment:

- (1) Only One Responsible Source,
- (2) Unusual and Compelling Urgency,
- (3) Industrial Mobilization; Unique Capability; or Expert Services,
- (4) International Agreement,
- (5) Authorized by Statute,
- (6) National Security, or
- (7) Public Interest. [FAR 6.302]

The genesis of this term is central to this study, and it will be discussed in greater detail in later chapters.

## **3. Contracting by Negotiation**

There are essentially two methods of contracting in the Government: competitive negotiation and sealed bidding. Sealed bidding is most desirable, and is where a responsible bidder is awarded the contract based on the lowest, responsive bid. Sealed

bidding should be used where (1) time permits, (2) the basis for award is price, (3) no discussions are required, and (4) more than one bid is expected. [FAR 6.401] Furthermore, the sealed bidding process is objective.

In contrast, contracting by competitive negotiation is much more subjective. The contracting officer can consider many factors—not just price—in awarding the contract, including tradeoffs of technical merit, management ability, contractor past performance, and realism of cost estimates, to name a few.

#### **4. Efficient Competition**

Efficient competition is a new phrase established by the Federal Acquisition Reform Act (FARA), and is tied to the requirements for full and open competition. Furthermore, FARA directed that the writers of the FAR were to implement "full and open competition...consistent with the need to efficiently fulfill the Government's requirements." [Federal Acquisition Reform Act 1996, Sec. 4101]

Changes were also made to 10 U.S.C. 2305(b) that provide essential guidance to determining the efficient competitive range. Here, authority is given that Contracting officers "may limit the...competitive range,... to the greatest number that will permit an efficient competition." [Federal Acquisition Reform Act 1996, Sec. 4103]

What is the definition of efficiency? The dictionary defines efficiency as the "effective operation as measured by a comparison of production with cost (as in energy, time, and money)." [Webster's new collegiate dictionary 1981, s.v. "efficiency"] That said, there is no statutory or regulatory definition of efficiency or efficient with regard to

setting the competitive range. Rather, it is dependent on the circumstances and includes, but is not limited to, the following factors: the nature of the requirement (including production lead-time, delivery requirements, etc.); the resources available to conduct the negotiations; the variety and complexity of solutions offered; and any other relevant matters. The judgment of the contracting officer—as to the greatest number that will permit an efficient competition among the most highly rated proposals—is the requirement established by statute. [*Defense Acquisition Deskbook* 1997, Wisdom & Advice: Definition of Efficiency]

#### **D. RESEARCH METHOD**

The theoretical framework of this study is based on an inductive model, and will include both historical and descriptive research. It will be conducted using the following four-step methodology: (1) historical research of secondary archival data via sampling and scanning, (2) evaluation and analysis of archival data, (3) descriptive research via interviews and personal narratives, and (4) inductive assessment of the impact on contracts management. [Buckley, Buckley, and Chiang 1976, 23] Since this study is also concerned with perceptions and attitudes regarding the new legislation and its impact on competition, analysis of that portion of the descriptive research will be from a qualitative standpoint.

As just mentioned, the information required for the research methodology is of two forms: (1) archival data, and (2) opinion research. The archival data will be the primary resource for establishing the legislative policy intent of the FAR Part 15 Rewrite

concerning competition, and will be obtained from sources that include the Congressional Record, administration initiatives, policy hearings, FAR Council writings, Department of Defense (DoD) acquisition directives, and professional journals.

The opinion research will provide the basis for determining industry and contracting officer perspectives on the changes, and will involve conducting personal and telephone interviews with contracting professionals in both categories. The opinion research will encompass personnel who deal with both large and small defense contracts, and will also reflect geographic diversity. The following is a list of general questions that will be used in the interviews conducted with industry, with a slightly modified version for contracting officers:

1. Approximately what percentage of your company's contracts—in total dollars—are with the Government, either as a prime or subcontractor? What percentage of these are negotiated contracts?
2. What do you think is the purpose of the FAR Part 15 Rewrite with regard to competition?
3. One of the primary goals of the new policy is to expand the number of offers by simplifying the process. Will the new policy encourage your company to pursue Government contracts more so than in the past?
4. Overall, do you feel the new policy is an improvement to the source selection process and contracting with the Government?
5. If yes, do you feel it equally benefits both industry and Government?

6. If no, how does it diminish competition in the source selection process?
7. What changes made by the new policy are likely to generate the most protests with regard to competition?
8. How would you change Part 15 to avoid the problems with competition you foresee?

## **E. ORGANIZATION OF STUDY**

This study analyzes the FAR Part 15 Rewrite and its affect on competition. The following is an overview of each of the chapters in this study:

- **I. Introduction:** Describes the purpose of this study, the research questions, scope, limitations, assumptions, methodology, and thesis organization.
- **II. Competition and Negotiated Source Selection: Before the Rewrite:** Discusses the pre-Rewrite history and policy on negotiated source selection; and the political, commercial, and legislative influences that gave rise to the emphasis of competition in the old policy.
- **III. The FAR Part 15 Rewrite—External and Commercial Influences:** Provides the business management theories and the commercial practices that influenced the Rewrite. Discusses the underlying framework that acquisition reformers have attempted to emulate in modifying and reforming the Federal acquisition system.
- **IV. The FAR Part 15 Rewrite—Political and Legislative Influences:** Evaluates post-CICA reform initiatives, from the Packard Commission to the present. Provides the recurring principles and ideals that acquisition reformers have proposed as a solution

to the existing procurement process, and which are manifested in the FAR Part 15 Rewrite.

- V. Key Changes to Negotiated Source Selection: This chapter is an analysis of the major changes affecting competition that were made to the FAR Part 15. Here, the key issues and projected problems associated with the Rewrite will be discussed.
- VI. Industry and Contracting Officer Assessment of the New Policy and its Impact on Competition: In this chapter, the opinion research and an analysis of that data will be presented. In doing so, the chapter will also provide a working level perspective of the new policy, including its benefits and expected problems.
- VII. Conclusions and Recommendations: This chapter summarizes the study, discussing the advantages and disadvantages to managing competition under the new policy. In addition to providing the major conclusions, it will also provide agencies and contracting officers the recommendations needed to mitigate potential problems arising from the new policy. Finally, it will suggest areas for further research.

#### **F. BENEFITS OF THE STUDY**

This study will provide insight and analysis into a fundamental change in acquisition policy—one that is certain to generate legal challenges and continued debate. This, in turn, will provide Government contracting officers the sound advice needed to implement effectively the changes when conducting source selection, thus minimizing the likelihood of protest due to a violation of CICA. Correspondingly, Government agencies and their employees will be better able to manage these core acquisition processes.

Finally, it is expected that this research will contribute to ongoing reform in policies and regulations affecting negotiated contracting. In doing so, the study will provide an assessment of a significant change in acquisition processes, and serve as an initial evaluation of a major reform policy. By providing insight into this critical step in acquisition reengineering, the study will help facilitate follow-on efforts to reform the Federal acquisition system.

## **II. COMPETITION AND NEGOTIATED SOURCE SELECTION:**

### **BEFORE THE REWRITE**

#### **A. COMPETITION AND ITS BENEFITS**

What is competition? Why should we pursue it as a Federal procurement policy? A simple definition of competition is that it is the "effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms." [*Webster's new collegiate dictionary* 1981, s.v. "competition"] Certainly, anyone that makes a personal purchase—e.g., a car or home loan—would offer up a similar concept. Here, it is very easy to see that the competition created when there is more than one auto dealer predicts a lower price or more features for the prospective owner. Most people take it as a given that greater competition results in a better deal for the consumer, and their practical experience supports this idea.

Economic analysis confirms that a perfectly competitive market does in fact lead to an optimal allocation of goods and resources for the consumer. There are, however, five key assumptions of perfect competition. First, no individual buyer or seller dominates its respective function. Second, all participants have perfect information as to the market clearing price for the relevant good. Third, the product of competing firms—for the market in question—is essentially homogeneous. Fourth, resource inputs are freely mobile to respond to expansions and contractions in the market. Finally, production and consumption decisions are independent of similar decisions made by

other players. Given that these assumptions are met, the market will achieve a competitive equilibrium price at the point where supply equals demand. Furthermore, the allocation of resources and goods will be optimal. [Eaton and Eaton 1995, 283-284]

Obviously, perfect competition is not possible in all Government procurements—notably large, complex major system acquisitions where there are very few suppliers. Although perfect competition may not be possible in all instances of Government procurement, a high degree of competition can be obtained by creating an environment whereby as many suppliers as possible are able to compete, primarily through widely achievable specifications. Here, the presence of sufficient competition can prevent individual firms from affecting the price of a product. [Pindyck and Rubinfeld 1995, 11; Dobler and Burt 1996, 297-299; Washington 1997, 183]

Although competition provides Government the opportunity to purchase goods at lower prices, it also serves other valuable functions. Competitive forces are also credited with such benefits as promoting innovation and technological change, enhancing mobilization and industrial capability, curbing cost growth, and preserving the sense of "fair play" regarding the Federal procurement system. [U.S. Senate *Legislative History* 1983] Whether it is getting the lowest price or ensuring fair treatment of potential contractors, competition has become a fundamental goal of an effective procurement system.

## B. EARLY INFLUENCES AND LEGISLATION

### 1. Through World War II

Congressional guidance on competition is almost as old as the nation itself. In 1809, Congress established the first law directed at increasing competition when it imposed a requirement for formal advertising. This law, the first in a series that dealt with formal advertising, was designed to increase fairness and address the issue of favoritism. [*Act of March 3, 1809*] Formal advertising continued to be the preferred method of Federal purchasing throughout the remainder of the 19th century, but profiteering and scandal led to increasingly specific Congressional guidance. [Menker 1992, 16] During 1861, Congress again passed a law—which ultimately became known as Section 3709 of the Revised Statute when it was amended in 1910—that stressed the need for formal advertising except for certain exceptions. [*Act of March 2, 1861*] Notably, this law served as the basic procurement statute until after World War II.

During World War I, Congress relaxed the formal advertising requirements, authorizing the War Industries Board to use negotiated procurements to engage the country's industrial capabilities quickly. [U.S. Senate *Competition in Contracting Act of 1983, Report 1983*, 6] Similarly, in World War II, Congress passed legislation that allowed contracting "without regard to the provision of the law relating to the making, performance, amendment, or modification of contracts." [*First War Powers Act 1941*] In fact, the War Production Board was so concerned with expediency that they prohibited

the use of formal advertising without authorization. This proved to be a common theme during every national emergency, from the Civil War through World War II, where negotiated procurement was the preferred means for quickly obtaining goods and supplies.

## **2. Armed Services Procurement Act of 1947**

As the war drew to an end—and with it expiration of the First War Powers Act—agency representatives began to study optimal peacetime procurement methods. Certainly, World War II procurement that was characterized by expanded negotiating authority and streamlined purchasing was particularly influential. Here, greater judgment and authority by contracting officers—which provided increased flexibility and responsiveness—had proved invaluable in mobilizing the country's resources. This and other factors led to the recommendation that contracting officer's be given the authority to negotiate contracts when advertising was unrealistic. [Thybony 1985, 3]

Congress accepted the recommendations of the study, and enacted the Armed Services Procurement Act (ASPA) of 1947, Public Law (PL) 80-413. Although the law emphasized formal advertising as the preferred method of contracting, it also authorized negotiated contracting under 17 exceptions. In passing this legislation, Congress recognized that greater contracting flexibility, by allowing negotiated procurement during peacetime, would provide economic benefits and also advance the national security interests. The ASPA also consolidated Army and Navy procurement authority into one statute, ultimately providing the foundation for a uniform set of procurement laws for the

two Services. The ASPA was later codified under Title 10 of the U.S. Code by PL 84-1028.

### **3. First Hoover Commission 1947-1949**

The Hoover Commission, otherwise known as the Commission on Reorganization of the Executive Branch, made numerous suggestions aimed at continuing the improvements begun by the ASPA. In addition to more centralized and standardized procurement—the General Services Administration (GSA) was a result of the recommendations—the commission also recommended extending to all agencies the ability to conduct negotiated procurements. In 1949, Congress acted upon these recommendations and passed the Federal Property and Administrative Services Act (FPASA). Thus, the civilian agencies were given the same negotiating authority as that enjoyed by the military, except in two cases. Here, although the ASPA granted the military 17 exceptions to formal advertising, the FPASA restricted civilian agency exemptions to 15; omitted from the civilian exemptions were (1) the need for a facility for mobilization, and (2) a requirement involving substantial investment. [*Federal Property and Administrative Services Act 1949*] Notably, this was another example of the civilian agencies following DoD's lead in the transformation of procurement regulations, which has continued through to the present day.

### **4. PL 87-653 and the Truth in Negotiations Act**

During the years following enactment of ASPA and FPASA, the weapons of modern war grew increasingly complex and expensive. Partly as a result of the Korean

War and partly due to large technological leaps in electronics, atomic energy, and aerospace, weapon systems experienced tremendous improvements in capability and sophistication. In order to contract for these same systems, DoD increasingly turned to the flexibility of negotiated procurement. [U.S. Senate *Competition in Contracting Act of 1983: Report* 1983, 7] In doing so, the Government instituted new techniques and organizational structures in an attempt to deal with purchases that were ripe for mismanagement, waste, and inefficiency. Some of these innovations included incentive contracts, both cost and fixed price, and total package procurements, where development and production were combined into one contract. Certainly, these innovations were only possible through negotiations and discussions with offerors. [*Report of the Commission on Government Procurement* 1972]

The increasing reliance on negotiated contracts was dramatically displayed in 1960, when 85 percent of all Federal contracts were awarded through negotiated procedures. [U.S. Senate *Legislative History* 1983, 8] This, combined with the growing perception that savings from competition were lacking in negotiated procurements, led Congress to pass PL 87-653 in 1962, which amended the ASPA. This law required "oral or written discussions" with all firms "within a competitive range" during negotiated procurements, and also tightened the exceptions to formal advertising. Incidentally, the legislation also required the inclusion—in all negotiated procurements over \$100,000—of a contract clause allowing for price reductions in the event of defective pricing. This pricing provision is also known as the Truth in Negotiations Act (TINA).

## **5. Commission on Government Procurement**

During the 1950s and 1960s, the nation underwent a number of changes that directly impacted the Federal procurement system: onset of the Cold War and superpower armaments; strategic nuclear deterrence policy; the space race; and the increased use of national funds to address social and economic goals. Unfortunately, these same changes brought with them procurement challenges that the present system could not address. The result was repeated instances of sensational cost overruns and weapon systems' shortcomings. [Gates 1989, 3]

In response to this and a widespread belief that Federal procurement was mismanaged, the Commission on Government Procurement (COGP) was created. Established as a bipartisan, 12-member body made up of representatives from the public and the Executive and Legislative branches, the COGP issued 149 recommendations in its 1972 report. [*Report of the Commission on Government Procurement 1972*] Two of the recommendations are particularly relevant to the FAR Part 15 Rewrite: one concerned negotiated procurements, the other advocated creation of the Office of Federal Procurement Policy (OFPP).

### **a) *Negotiated procurements***

As expected, the COGP confirmed that formal advertising was the preferred method of contracting. It went on, however, to recommend the inclusion of competitively negotiated procurement as "an acceptable and efficient alternative" in certain cases. The COGP's 1972 report stated:

...the point is not that there should be more negotiation and less advertising, but that competitive negotiation should be recognized in law for what it is; namely, a normal, sound buying method which the Government should prefer when market conditions are not appropriate for the use of formal advertising. [*Report of the Commission on Government Procurement* 1972]

Certainly, this reflected the long-held understanding that increasingly modern weapon systems demand increasingly complex procurement methods—methods that provide the flexibility to consider a variety of factors, not just lowest price. In the end, however, it would be CICA which would adopt this recommendation.

**b)      *Office of Federal Procurement Policy***

Congress did agree with the COGP's recommendation to consolidate the Federal procurement system under one office. In 1974, PL 93-400, the Office of Federal Procurement Policy (OFPP) Act, created the OFPP and gave Federal procurement a centralized voice regarding policy, regulations, and procedures. This consolidation benefited both Government and industry alike, and helped to address procurement inconsistencies that had developed over the years among the different executive departments and agencies. The OFPP was also tasked with developing a uniform procurement regulation, promoting and conducting procurement research, and overseeing acquisition workforce career development. [*Office of Federal Procurement Policy Act* 1974]

In 1978, Congress amended the OFPP Act, directing OFPP to establish a "single, simplified, uniform Federal procurement regulation." The OFPP submitted its proposal for a Uniform Federal Procurement System (UFPS) in 1982, which was

ultimately implemented as the Federal Acquisition Regulation (FAR) on April 1, 1984.

Notably, OFPP's involvement with the FAR, which is written on the basis of previous legislation and Congressional intent, marked the entry of OFPP as overseer of procurement directives. Subsequently, all changes and modifications to mandatory policies and procedures relating to Federal procurement have been incorporated by OFPP into the FAR.

### **C. COMPETITION IN CONTRACTING ACT**

The Competition in Contracting Act (CICA) of 1984 was the most significant procurement reform legislation in over 35 years. Written on the heels of numerous spare parts pricing scandals, which many thought emblematic of greater problems in the system, and a belief that increased competitive procedures could lead to savings of between 15 and 50 percent, CICA strived to inject greater competition into Federal procurements. [U.S. GAO *Federal regulations* 1985, 60] By reducing the number of sole-source or non-competitive procurements, the benefits of increased competition were expected to ultimately result in greater cost savings for the Government. Enacted during a time of dramatically increasing DoD budgets, CICA was also seen as a way to offset or stymie a growing problem with exorbitantly priced sole-source procurements.

#### **1. Congress and Competition**

During the 1970s and early 1980s, Congress became increasingly concerned with the steady trend toward a greater and greater percentage of "noncompetitive" procurements. The General Accounting Office (GAO), in fact, assessed DoD's use of

competitive procurements in 1979, and concluded that 25 out of the 109 noncompetitive awards reviewed could have been awarded competitively. [U.S. GAO *DoD loses* 1981] A similar conclusion was reached in 1982, when GAO studied six civilian agencies and reported a failure to obtain competition on an estimated 40 percent of the sole-source contracts awarded. [U.S. GAO *Less sole-source* 1982] These reports and Congressional hearings, conducted in the same timeframe, only increased the call for greater competition in the Federal procurement system.

Interestingly, even the definition of "competition" held different meanings for many of the members of Congress and for the public. [Peterson 1988, 36] Commonly, competition was equated with price competition, where essentially homogeneous products are simply differentiated by price. This definition was most often associated with formal advertising, where award was made to the lowest responsible bidder from a number of bidders offering the same basic product. In competitive negotiation, however, the award is based on the evaluation of a variety of competed factors, only one of which is price; design or technical competition is also considered in determining contract award.

Unfortunately, when a member of Congress quoted a statistic concerning the lack of competition, the statistic was often doing just that: describing performance in formal advertising. For example, Senator Proxmire cited DoD's procurement for 1970 as a year where "only 11 percent is competitive." While true of DoD formal advertising, almost 43 percent of all contracts awarded that year were competitively acquired in the broader definition—competition in formal advertising or one of the evaluation factors in

negotiation. [Rich 1976, 8] That said, DoD also held a liberal view of competition, characterizing anything but sole source as competitively awarded. [Rich 1976, 7]

Regardless of the exact definition of competition, Congress and public perception held that Federal procurement was inefficient. Citing such things as cost overruns, exorbitantly priced common items, and a burgeoning DoD budget, the lack of "competition" was given much of the blame. [U.S. GAO *Federal Regulations* 1985] Since Congress held the axiomatic view that greater competition equaled greater benefit, they resolved to boost competition in Federal procurement. As such, Congress mandated that CICA "establish an absolute preference for competition." [U.S. Senate *Legislative History* 1983, 17]

## **2. CICA's Competition Reforms**

On 18 July, 1984, President Ronald Reagan signed CICA into law as part of the Deficit Reduction Act, PL 98-369. Section 2721 of the legislation established the basic intent of the law: to use full and open competition to increase responsiveness and the capability of the industrial base, while reducing costs of procurement. [*Competition in Contracting Act* 1984, Sec. 2721]

In its final form, CICA made a number of key changes to existing laws regarding competition. The following are the five major changes that are most relevant to this study:

*a) Competitive negotiation and formal advertising*

One, it eliminated the preference for formal advertising—renamed sealed bidding by CICA—and put competitive negotiation on an equal level. Competitive procedures would now encompass both formal advertising and competitive negotiation, as long as the contract was entered into pursuant to full and open competition.

*b) Appropriateness of sealed bidding*

Two, CICA required the use of sealed bidding when the following four conditions were met: (1) adequate time, (2) awarded on price, (3) no need for discussions, and (4) expect more than one bid. If these conditions were not met, then competitively negotiated proposals should be requested.

*c) From 17 exceptions to seven*

Three, it eliminated the 17 exceptions to formal advertising and replaced them with seven exceptions to full and open competition. These seven exceptions, required when "other than competitive procedures" were used, included: (1) only one source and no acceptable substitute product; (2) unusual and compelling urgency; (3) in order to maintain an industrial, engineering, research, or development capability; (4) based on international agreement; (5) authorized or specified by statute; (6) for national security; and (7) in the public interest. These seven exceptions, with minor modification, continue to be the standard today for contracting by other than full and open competition.

*d) Excluding sources*

Four, it allowed exclusion, based on certain factors, of a particular source in order to establish or maintain an alternative source of supply. Similarly, it allowed for limited competition in certain instances involving small business concerns.

*e) Competition advocate*

Finally, it required the executive agency to create a competition advocate position, and to submit an annual report concerning competition and competitive procurements.

Undoubtedly, the overwhelming purpose of CICA was to increase the actual proportion of competitively awarded contracts. Congress accomplished this by explicitly setting out the competitive award processes and then mandating an annual report of progress, forcing the Federal procurement system to focus on reducing noncompetitive buys. As the percentage of competitive purchases increased, cost savings and greater fairness for contractors were expected to naturally follow.

**3. Full and Open Competition**

*a) History*

"Full and open competition" is a term that is central to CICA, but which was first coined over 50 years earlier. In 1928, the Comptroller General first used the phrase "free and open" competition to describe the legislative intent of Section 3709, Revised Statutes. Here, the Comptroller General said that the purpose of the procurement laws was to provide "all concerned...an equal chance in securing contracts for

Government work," and to prevent contractor collusion and agency favoritism. [8 Comp. Gen. 252 1928, A-24906] Similarly, the ASPA of 1947 used the phrase "full and free" competition to describe its requirements for formal advertising, although the phrase became "free and full" when codified as 10 U.S.C. 2305. [Doke 1995, 6] As a result of legislation such as this and various case law, the phrase "full and open" competition came to represent the standard for competition in Government purchasing.

*b) Congressional debate*

When debate began on CICA, the standard for competition was again a central topic. The Senate proposed that the standard for competitive procedures mean solicitation "from more than one source that is capable of satisfying the needs of the agency." All other procedures would be "noncompetitive procedures." [U.S. Senate *CICA*, S.338 1983, Sec. 303]

In contrast, the House proposed three levels of competition. First, "full and open" competition would be where "all qualified sources are allowed and encouraged to submit" bids or proposals, and each "bid or competitive proposal is fully evaluated by the executive agency in the selection of a contract recipient." It would also restrict contracting officers from entering into a contract until a "sufficient number" of bids or proposals were received "to ensure...requirements are filled at the lowest possible price given" the acquisition. The second level of competition was that which was "less rigorous than full and open competition." This was where award would be made from a pool of a limited number of qualified sources—at least two or more—who would be

permitted to submit offers. Finally, the third level was "noncompetitive," and described award "after receiving only one bid or proposal." [U.S. House *CICA*, H.R. 5184 1984, Sec. 202]

The Congressional discussion and final decision concerning this issue is particularly revealing. Here, the House's strict definition of "full and open" won out over the Senate's less restrictive version of "more than one source." The House Committee on Government Operations provided the following insight into their reasoning:

...an acquisition is hardly competitive when it is limited to just two independent sources, since additional bidders are often available to meet a government requirement. Using the traditional view, an agency may select two of its favorite vendors and then assert that a "reasonable degree of competition" had been achieved. The Committee believes that full and open competition exists only when all vendors are allowed to compete in an agency acquisition. [U.S. House *CICA of 1984: Report 1984*, 16]

Notably, a cautionary view—and a similar argument to that *supporting* efficient competition via the FAR Part 15 Rewrite—was also expressed concerning the impact of the full and open standard:

Competition is not a goal itself, but a means to the goal of efficient and economical procurements. Might the inflexible application of the means occasionally interfere with the achievement of the goal? From the government's perspective, every procurement has two costs: the price of the item and the administrative costs related to the contract. If limiting competition on a particular contract increases the price of the item by a smaller amount than the decrease in administrative costs, wouldn't full and open competition result in a less efficient procurement? [U.S. House *CICA of 1984: Report 1984*, 64]

This would prove to be a prescient statement, as the Federal procurement system would come to realize in the remainder of the 1980s and the early 1990s. [Coy 1986, 86; Washington 1997, 179]

c) *Final definition*

In the end, the phrase "full and open" competition became the critical criterion for determining whether a purchase was made under competitive procedures. If full and open competition was present, then competition existed, whether the purchase was through sealed bidding or negotiation. CICA went on to say "full and open competition...means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement." Furthermore, responsible source was defined as:

a prospective contractor who —

- (A) has adequate financial resources to perform the contract, or the ability to obtain such resources;
- (B) is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Government business commitments;
- (C) has a satisfactory performance record;
- (D) has a satisfactory record of integrity and business ethics;
- (E) has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain such organization, experience, controls, and skills;
- (F) has the necessary production, construction, and technical equipment and facilities, or the ability to obtain such equipment and facilities; and
- (G) is otherwise qualified and eligible to receive an award under applicable laws and regulations. [*Competition in Contracting Act* 1984, Sec. 2731]

Thus "full and open" competition became the keystone of CICA, and would also become the principle most frequently invoked by critics of the FAR Part 15 Rewrite.

#### **D. SUMMARY**

As previously mentioned, a central purpose of this thesis is to assess the impact of the FAR Part 15 Rewrite with regard to competition. In order to gauge the impact, it is essential that the standard for competition be firmly established. This chapter traced the history and legislative intent of policies regarding competition, culminating with CICA's mandate for full and open competition.

Undoubtedly, there are many well-recognized benefits to increased competition: lower prices, greater perception of fairness, and an expanded industrial base, to name just a few. This chapter has examined the circumstances and initiatives that led to repeated efforts to instill greater competition into the Federal procurement system. Here, the Government's response was to focus on increased effectiveness by maximizing the percentage of competitive procurements. In the next chapter, I will show how influential external forces began to focus increasingly on *efficient* procurement in a time of constrained resources.



### **III. THE FAR PART 15 REWRITE - EXTERNAL AND COMMERCIAL INFLUENCES**

#### **A. INTRODUCTION**

This chapter and the next will discuss the influences that created the reform environment under which the FAR Part 15 was rewritten. In order to discuss acquisition reforms from the latter part of the 1980s through the present, however, it is necessary to provide some historical context. Simply put, what events have given rise to the most recent period of acquisition reform efforts? Undoubtedly, the nation's persistent budget deficits and the end of the Cold War have had a fundamental impact on reform initiatives—particularly the emphasis on efficiency.

In 1980, Ronald Reagan was elected to the first of two terms, largely by virtue of his promise to reassert the nation's economic and military might. Once in office, he took dramatic steps to address these two areas. Economically, he endorsed a restrictive monetary policy to stabilize the currency and end runaway double-digit inflation. In addition, he signed a 25 percent across-the-board tax cut that was enacted over a period of three years. In terms of defense, he doubled military spending—in real dollars—by 1987 in response to the threat of the Soviet Union and its satellite countries. Notably, this increase in military expenditures represented 6.3 percent of Gross Domestic Product (GDP) in 1987, versus 5.3 percent of GDP in 1981. [Niskanen and Moore 1996, 1]

Unfortunately, these "costs"—reduced taxes and increased military spending—were not offset by the third leg of Reagan's platform: achieve a balanced budget by limiting domestic spending. Although domestic outlays as a percentage of GDP did fall during his two terms, it was not enough to counteract the substantially reduced taxes and increased military spending. As a result, by the latter part of the 1980s, the nation faced an increasingly tight Federal budget and a growing national debt.

A temporary answer to the problem was provided when the Cold War ended during the Bush Administration. With the Soviet Union's collapse, the need for sustained high levels of military spending had evaporated. So, just as occurred during Reagan's presidency, Congress was able to avoid the politically hazardous task of cutting domestic spending. Instead, the vast majority of spending cuts in the Federal budget during the past ten years have been made through reductions in the defense budget.

These last ten-plus years have seen the DoD budget drop by roughly one-third. Despite this significant fall, it is recognized that the defense budget—absent the mercurial rise of a new superpower—is unlikely to achieve even inflationary increases during the foreseeable future. This has led to increased calls, both inside and outside of DoD, for ways to squeeze greater value from scarce budget resources. [U.S. GAO *Aircraft Acquisition*, 16-17]

If a shrinking budget is the challenge, then greater efficiency has become the answer. Not surprisingly, Government reformers have turned to industry and commercial practices for guidance on gaining increased efficiency. [Carey 1996, 128] Certainly, the

worldwide competition that companies face on a daily basis makes them excellent sources for best practices and streamlined acquisition management systems.

## **B. REINVENTION AND TOTAL QUALITY MANAGEMENT**

There are two particularly influential ideas that frame the efforts of acquisition reformers: (1) the reinvention or reengineering of Government, and (2) the Total Quality Management (TQM) approach to improving processes. These two management theories espouse that greater efficiency and effectiveness can be achieved despite limited resources.

### **1. Reinvention of Government**

The reinvention of Government is not a new concept, but rather a natural response to changes in the environment. The most recent example was the onset of the industrialized economy, when the nation responded with the Progressive Era and the New Deal. Here, the “reinvention” resulted in an expansion of the Government’s role during the first half of this century. [Osborne and Gaebler 1992, xvi] Now, in the last part of the 20th century, the movement is towards a smaller and more efficient Government.

Writers on Government reinvention advance a number of themes that are particularly relevant to this study. The following are some of the ideas and recommendations that serve as a foundation for the FAR Part 15 Rewrite:

#### **a) *Reduce rules and red tape***

This principle states that rules and red tape are the outgrowth of a need by overseers—both political and managerial—to minimize the chance of anything going

wrong. Rather than suffer an embarrassment, they institute detailed and bureaucratic methods for handling every task. The result is a stifling labyrinth of rules and regulations that slow the providing of even the simplest service. Similarly, this system demotivates employees, telling them how, when, and where they are to perform every task. So, instead of improving the system through tighter controls, "our attempt to prevent bad management made good management impossible." [Osborne and Gaebler 1992, 117] An American Bar Association study made the following observation: "Rather than stimulating efficiency, initiative and imagination, the current acquisition environment blankets the contracting officer with oversight, laws and regulations." [ABA Ad Hoc Committee 1987, 5]

This focus on rules and boundaries should be replaced by a focus on the mission. Here, the emphasis should be on finding the organizational mission, and then designing a system that allows the employee to pursue that mission. This will greatly increase the organization's efficiency, freeing up resources previously dedicated to time-consuming and costly risk-avoidance. Without this change, the negative effects on good managers will far outweigh the good. [Osborne and Gaebler 1992, 110-113]

**b) *Provide flexibility and discretion***

Many who write on the subject of reinvention talk of instilling entrepreneurial management in Government. Here, public organizations would "foster a willingness...to solve problems and take risks instead of falling back on routines or standard operating procedures." [DiJulio, Garvey, and Kettl 1993, 76] These same

organizations would encourage innovation and new thinking about resource consumption, and look for new and better ways to increase efficiency and productivity. But here, rather than the stereotype of the risk-taking entrepreneur, the model employee understands risk and works to minimize it, but is not paralyzed by the uncertainty. Instead of the typical bureaucratic focus on risk avoidance, the entrepreneurial manager seeks to manage the risk inherent in almost any worthwhile opportunity. [Osborne and Gaebler 1993, xx] Currently, employees are so risk averse "that this caution interferes with the necessary work of government." [DiIulio, Garvey, and Kettl 1993, 37]

In order to become more entrepreneurial, public managers must be given increased flexibility and discretion. With this expanded discretion, the employees are then able to make prudent business decisions. [Lauren 1997, 1] Additionally, they must be encouraged to conduct tradeoffs regarding the costs and benefits of those decisions, knowledgeable that organizational leadership will support reasoned choices. This means leaders who understand that people who act with initiative and innovation are going to fail, but that the alternative is employees who never embrace or search for ways to improve the current system. Certainly, the easiest path is to maintain the status quo, but the nation can ill afford the current, high cost of Government. [Osborne and Gaebler 1993, 135]

## **2. Total Quality Management**

Dr. W. Edwards Deming's TQM theories were also very influential, although they gained initial acclaim in Japan. There, his ideas on process improvement and quality

were given wide credit for contributing to the ascension of Japanese industry and goods on the world stage. In the United States, however, he was largely unknown until a documentary entitled "If Japan Can...Why Can't We?" was aired on NBC on June 24, 1980. This documentary—a response to the economic threat from Japan—detailed the work of Deming and how his principles were credited with tremendous improvements in productivity and decreases in costs. [Walton 1986, 19] Although Deming's principles are most often associated with manufacturing environments, they are equally applicable to other sectors.

Although TQM means different things to different people—having been liberally used as an umbrella term for a variety of management initiatives—at its core it has a few basic tenets. Three of the fundamental principles that have been particularly influential in acquisition reform are detailed below:

*a) End the Practice of Awarding Business on Price Tag Alone*

This is undoubtedly the most obvious example of a TQM concept that has been adopted by acquisition reformers. Certainly, the mandate to use past performance information and to make award based on best value are derivatives of this TQM principle. Here, Deming discussed the pitfalls of awarding to the lowest offeror, saying that the cheapest supplier will result in inferior products, require costly oversight, and ultimately cost more in the long run. In addition, when these low quality products are input into the production stream, it is inevitable that the end product will be flawed. [Walton 1986, 63]

Whether this is a component in a weapon system or the end item itself, the result is costly rework and possibly a dangerously unsafe piece of equipment.

Similarly, in order to acquire quality products, organizations "need to be proactive and speak to [suppliers] directly about [the buying organization's] needs." [Cohen and Brand 1993, 19] Through increased dialogue and communications, suppliers can better understand the needs of the buying organization. Once the supplier knows what the buyer wants and has clarified any questions, the supplier can focus on providing a product that fully meets all of the customer's requirements. [Cohen and Brand 1993, 83-87]

*b) Drive Out Fear*

This principle speaks of empowerment and giving employees the authority to make decisions. Here, if fear of failure is not removed, costly and debilitating problems will continue uncorrected. Rather than chance being blamed or advancing a solution that might be risky, "in the perception of most employees, preserving the status quo is the only safe course." [Walton 1986, 72] This creates a culture where risks are avoided, problems are not confronted, and productivity ultimately suffers. Instead, managers must incentivize their employees to make risky suggestions, to think innovatively, and to identify shortfalls in performance—rather than the customer finding them. Managers "must build a system that engenders an open discussion of failures as well as successes." [Cohen and Brand 1993, 8]

*c) Remove Barriers to Pride of Workmanship*

This principle exhorts organizations to create a culture and environment where employees' inputs are valued. All too often, "management never invests employees with any authority, nor does it act upon their decisions and recommendations. Employees become... disillusioned." [Walton 1986, 82] Instead, employees should be legitimately involved in the process improvement, for they are the most knowledgeable concerning limitations and opportunities.

Similarly, an organization's defective processes and procedures place a de facto ceiling on the ability of employees to produce quality work. This, in turn, results in an employee who feels trapped by a flawed system, sapping motivation and productivity. Rather, by involving the employee in "self-analysis" of the process and then empowering them to carry it out, ownership and commitment is created. [Cohen and Brand 1993, 24]

**C. BEST PRACTICES OF INDUSTRY**

In addition to the management theories just discussed, acquisition reformers have also turned to industry for guidance. Here, the sources of ideas are companies that must face global challenges in a dynamic business environment. Just as competition forces sellers to lower costs, boost quality, and generate innovation, so to does competition force changes in the buyer. The purchasing function—which is typically a cost center—must provide increased efficiencies and savings in order to maintain the overall company's competitiveness. Therefore, competition demands the pursuit of more effective and less costly practices, both as a function and in the products purchased. [Garrett 1996, 11]

In many Government procurement organizations, however, these competitive pressures are often missing for a variety of reasons: the Government is a monopsony, for many items; there are few sellers; profit is not the focus; and public funds are used, with the associated scrutiny. Thus, the Government's acquisition system does not operate in an environment that stimulates the development of optimum competitive practices. [Cancian 1995, 190; Rosen 1995, 74; Chew 1997, 218] Acquisition reformers, therefore, develop their models from observation of world class purchasing organizations, reasoning that these are tested and proven successful. The following are a few of the most influential commercial purchasing methods:

### **1. Streamlined and adaptive contracting**

This is the most significant and pronounced difference between commercial and Government procurement. [Garrett 1996, 14; Alston 1992, 9] In the Federal procurement system, contracting officers have very detailed and prescriptive guidance concerning every stage of the acquisition process. Industry purchasing officers, on the other hand, emphasize buying what the customer wants in the most efficient manner possible. Similarly, flexibility and adaptability are paramount in order to adjust to changes in the customer's needs. [Whelan 1984, 191] Whereas the Government contracting officer is constrained by a variety of unique requirements designed to implement social and economic policies, the private buyer simply wants his customer—the user—to get the item he needs. If the supplier can meet the commercial buyer's

needs, "it really does not matter what size the company is, where it is located, or who owns it." [Heberling and Kinsella 1998, 14]

## **2. Prequalification of suppliers**

Prequalifying suppliers allows the buying organization to reduce lead time by establishing a core group of responsive suppliers. In keeping with Deming's tenet to avoid "awarding business on price tag alone," this ensures quality and unforeseen costs such as post-award oversight and delayed delivery are managed before contract award. [Garrett 1996, 13]

## **3. Value-based tradeoffs of risk and opportunity**

"Value-based tradeoffs" describes the systematic consideration of the risks involved with a purchase, and then valuing these risks so that the buyers interests are protected. [Garrett 1996, 14] Here, all risks—including technical and performance—are identified and offset against the cost to the buyer of failure. This analysis recognizes that opportunity brings with it inherent risks, but that these risks can be managed. [Kitchenman 1994, 12]

## **4. Free-flowing communications**

In order to build the customer-supplier relationship described above, close communications are required. This results in dialogue during every stage of the process, including preperformance conferences, proposal evaluation, and contract award. [Garrett 1996, 14] Increased information flow also allows the seller to better integrate its capabilities with the needs of the buyer. Naturally, this increases the likelihood that the

buyer will get exactly what is needed; this also benefits the seller, who is interested in follow-on business with a financially strong buyer. [Heberling and Kinsella 1998, 15; Delane 1997, 45]

#### **D. INDUSTRIAL BASE**

Finally, the industrial base has played a major role in reforming the Federal acquisition system. Undoubtedly, the strength of the U.S. military is inextricably tied to the strengths and capabilities of U.S. industry. Industry provides the technological superiority necessary to succeed in modern war, and DoD's ability to harness that expertise is critical to maintaining our relative strength among the world's military forces. [Gansler 1991, 215] Two critical issues that affect the industrial base are discussed below:

##### **1. Defense Drawdown**

Since the end of the Cold War, the defense industry has experienced a rapid consolidation. In response to a steadily shrinking defense budget and the urging of DoD leadership, many contractors have either exited or merged due to the changed market economics. [Sharkey 1994, 20; LaBonne and Murphy 1994, 11]

Although the drawdown has reduced capacity, it has also reduced the ability of DoD to acquire critical material. Where before there were a number of contractors vying for an award, now there are dramatically fewer or no available suppliers. Since the DoD budget is unlikely to grow, reformers have looked for other ways to incentivize companies to pursue Government contracts. The solution most often suggested is to

make it easier for commercial firms to do business with the Government. By making it simpler and less costly to contract with the Government, the pool of suppliers should increase and provide competitive cost savings. [*Section 800 Report* 1993, 13; Gansler Delivers Keynote Address 1998, 9]

## **2. Access to State-of-the-Art Technology**

Combined with a shrinking number of defense contractors, there is the persistent problem of high tech companies choosing not to pursue DoD business. During the Cold War, the absence of these commercial firms was less noticeable, what with the many defense-oriented companies that were able to meet DoD's needs. Now, however, it is critical that the military take advantage of the abilities of these technological leaders. [Statement of USD(A&T) John M. Deutch 1994, 3]

The DoD vision of itself in the 21st century is that of a military using information and advanced technology to gain battlefield superiority. By leveraging the nation's worldwide leadership in technology, the military can enjoy a significant force multiplier effect. [*Peters Buying Time* 1998, 32] This emphasis on military strength through technology will also provide commercial benefits, such as research and development (R&D) cross-pollination, revenues to smooth economic cycles, development of new products, etc. [Gansler 1991, 274]

Currently, many high-tech companies do not sell to DoD due to the cumbersome and intrusive manner in which the Government contracts. For example, "five of the top 10 U.S. semiconductor producers refuse defense business because of special requirements

that the government imposes." [Gore *Creating a Government* 1994, 52] In addition to the oversight and audit requirements, they also cite the process as being extremely costly, both in terms of time and resources. Rather than focus on a defense market that is increasingly small, they simply do not pursue DoD contracts. [U.S. DoD *Acquisition Reform* 1994, 2]

Acquisition reformers want to reverse this problem by changing the way the Government conducts its purchases, making it more commercial-like. Simply put, this means minimizing the differences between commercial and Government contracting, making it transparent to sell to the Government. Currently, many companies that have Government contracts are forced to set up different units just to deal with the unique requirements and restrictions. [Engelbeck 1998, 15]

#### E. SUMMARY

This chapter has established the "outside" influences that have served as a framework, or reference, for the FAR Part 15 Rewrite. Notably, these influences have also had a dramatic impact on the way American companies themselves conduct business, whether privately or with the Government.

A common thread throughout this chapter has been the emphasis on efficiency. Here, greater efficiency is seen as critical to surviving and thriving in an environment marked by new threats. In the commercial sector, the pressure to become more efficient came from Japan and worldwide competitive challenges. Forced to become more efficient, top performing companies have emphasized quality processes, flexibility, and

employee empowerment. For DoD, the driving forces have been the end of the Cold War and persistent budget deficits.

The following chapter will discuss how acquisition reformers, both political and legislative, have attempted to apply these principles and practices. In doing so, the chapter will also provide a chronological guide to the major post-CICA influences on the FAR Part 15 Rewrite.

## IV. THE FAR PART 15 REWRITE - POLITICAL AND LEGISLATIVE INFLUENCES

### A. INTRODUCTION

Dating back to the early 1900s, there have been repeated efforts to reform the Federal procurement system. For the most part, however, these "reforms" have taken the form of increasingly prescriptive and detailed instructions: limits on who to buy from, rules on how to conduct the procurement, and regulations on how to administer the contract. As Secretary of Defense Perry said:

While each rule individually has [or had] a purpose for its adoption, and may be important to the process as a whole, it often adds no value to the product itself, and when combined, contributes to an overloaded system that is often paralyzed and ineffectual, and at best cumbersome and complex. [U.S. DoD *Acquisition Reform* 1994, 6]

Now, persistent budget deficits and the collapse of the Soviet Bloc have changed the focus of reform. In the years since the passage of CICA, acquisition reformers have increasingly highlighted the need for efficiency. So, where the current acquisition system "can best be characterized as an industrial era bureaucracy in an information age," the ideal system would more closely resemble commercial best practices. [U.S. DoD *Acquisition Reform* 1994, 7] Where the existing system places a premium on following the rules, documenting actions, and avoiding risk, the ideal system would reward innovation, sound business judgment, and risk management.

This chapter will discuss the key reform initiatives undertaken since the inception of CICA. Although the chapter does not evaluate every acquisition initiative from 1985 to the present, it will review those reform efforts that are manifested in the FAR Part 15 Rewrite. The reforms that will be addressed are the Blue Ribbon Commission on Defense Management (Packard Commission), the Section 800 Panel, the NPR, the Under Secretary of Defense (Acquisition & Technology) Procurement Process Action Team, and the FARA. The chapter will conclude with a short review of the process and sequence by which the FAR Part 15 Rewrite was actually accomplished.

**B. BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT  
(PACKARD COMMISSION)**

**1. Origin**

President Ronald Reagan issued Executive Order 12526 on July 15, 1985, thereby establishing the President's Blue Ribbon Commission on Defense Management. Commonly known as the Packard Commission, after its chairman, David Packard, it was charged with studying a number of major areas in defense management. One of those areas was the acquisition system.

In order to focus on the acquisition system, the Commission formed a group—the Acquisition Task Force (ATF)—led by William J. Perry. The ATF was tasked with determining and evaluating improvements to the acquisition system, and recommending "changes that can lead to the acquisition of military equipment with equal or greater performance but at lower cost and with less delay." [A Formula for Action 1986, 41] The

ATF's methodology for improving the system was to find best practices and use these practices as a benchmark for reforming defense procurement. This "search for excellence" involved examining commercial organizations that were recognized for procurement excellence, and then developing a model for use by the Defense Department.

[*A Quest for Excellence* 1986, 52] Notably, both the Commission and the ATF drew heavily on the ideas and principles advanced in Dr. Deming's TQM management theory.

[*A Quest for Excellence* 1986, 41]

## **2. Recommendations**

The Commission firmly concluded that the defense acquisition system possessed fundamental problems resulting from "an increasingly bureaucratic and overregulated process." As such, its recommendations focused on eliminating inefficiencies and adopting more commercial best practices. The following are two of the key recommendations that foreshadowed changes made in the FAR Part 15 Rewrite:

### **a) *Streamline Acquisition Organization and Procedures***

Historically, acquisition system overseers—Congress and DoD—have prescribed the solution by instituting increasingly specific and comprehensive rules and regulations. Here, the Commission recommended that "laws governing procurement should be recodified into a single, greatly simplified statute." [*A Quest for Excellence* 1986, 54] It recognized that an improved, streamlined acquisition system was not possible without accordingly streamlined procedures. Currently, "the sheer weight of

[regulatory] requirements often makes well-conceived reform efforts unavailing." [*A Quest for Excellence* 1986, 55]

In conjunction, the Commission said acquisition personnel needed increased authority to accomplish their jobs, and that greater discretion was required in order to allow sound business practices and common sense. Without these changes, greater efficiencies and cost savings would not be possible. Through adoption of these simple ideas, "layers of supervision can be eliminated, reporting can be minimized, and DoD can get by with far fewer people." [*A Quest for Excellence* 1986, 42]

*b) Increase the Use of Competition*

The Commission's comments regarding competition are particularly illuminating. Most significantly, it recommended the "elimination of...regulatory [including CICA] provisions that are at variance with full establishment of commercial competitive practices." [*A Quest for Excellence* 1986, 64] Citing commercial procurement best practices such as maintaining qualified suppliers, rewarding quality, and conducting tradeoffs, the Commission recommended DoD adopt similar practices in order both to increase competition and decrease total costs. In fact, the Commission stated that existing law had failed to increase "effective" competition, having focused solely on quantity. It went on to say that "more competition [pursued mechanistically] would be inefficient and sacrifices quality—with harmful results." [*A Quest for Excellence* 1986, xxiii]

Instead, through adoption of the Commission's recommendations, real competition would ensue and DoD would reap the benefits of lower costs and better products. Notably, the Commission said that CICA's mandate for full and open competition had worked *against* expanded competition in many cases. This had occurred because contracting officers interpreted the requirement for full and open competition as a need to structure the proposal and make the award based on lowest price. [*A Quest for Excellence* 1986, 62-64]

## C. DEFENSE MANAGEMENT REVIEW AND THE SECTION 800 PANEL

### 1. Origin

Although the Packard Commission made a number of valuable recommendations, it failed to generate sweeping legislative change. Others took note of the fact that this was the sixth, major defense acquisition study during the past four decades, with little to show in the way of actual change. In response, Secretary of Defense Cheney introduced the Defense Management Review (DMR) in June of 1989. He charged the DMR with providing recommendations to implement the Packard Commission findings, and to establish the structure for continuous improvement in DoD acquisition.

In 1990, the DMR gave way to the Section 800 Panel. Here, Congress recognized the executive-legislative partnership needed for reforming acquisition when they passed legislation forming the "Advisory Panel on Streamlining and Codification of the Acquisition Laws," otherwise known as the Section 800 Panel. The Panel was tasked

with reviewing all laws affecting DoD procurement, and was to make recommendations "toward streamlining the defense acquisition process." [*Section 800 Report* 1993, 1]

## **2. Recommendations**

The Panel reviewed 600 procurement laws out of the almost 900 provisions that related to defense acquisition. [*Section 800 Report* 1993, 1] Of those 600 laws that were reviewed, almost 300 were suggested for repeal, removal, or amendment. The final result was a report that was forwarded to Congress in January 1993. The report, broken down into three sections, focused on the following areas: (1) management framework, (2) defense acquisition, and (3) Government-industry relationship. The defense acquisition area will be addressed here, as it is the most relevant to the FAR Part 15 Rewrite.

Continuing a common theme, the Panel recommended that the defense acquisition system adopt the best practices of successful commercial and Government entities. These best practices included streamlining the purchasing process, consolidating and simplifying the rules, clarifying communication channels, reducing oversight layers, and adopting "best-buy" evaluation methods. [Sherman 1995, 168] Finally, although the Panel did not address at length the laws affecting negotiated source selection, its recommendations helped establish the principles and goals that would serve to guide future reform efforts in this area.

## **D. NATIONAL PERFORMANCE REVIEW - REINVENTING GOVERNMENT**

### **1. Origin**

On March 3, 1993, President Clinton created the National Performance Review (NPR). In announcing the NPR, the President made the following statement:

Our goal is to make the entire Federal government both less expensive and more efficient, and to change the culture of our national bureaucracy away from complacency and entitlement toward initiative and empowerment. We intend to redesign, to reinvent, to reinvigorate the entire national government. [Gore *From Red Tape* 1993, 1]

Led by Vice-President Al Gore, the NPR held its kickoff meeting on April 15, 1993. Notably, the co-author of *Reinventing Government*, David Osborne, spoke at the group's initial session and also served as a key advisor. [A Brief History 1996, 1]

### **2. Recommendations**

The final report of the NPR contained 384 recommendations. Details of these recommendations were contained in 38 accompanying reports, which listed 1,250 specific actions that were expected to save an estimated \$108 billion. [A Brief History 1996, 1]

One of the accompanying reports was entitled *Reinventing Federal Procurement*, which dealt with a central theme of the NPR's efforts: reforming the Government's acquisition system.

*Reinventing Federal Procurement* identified five overarching themes to improving the acquisition process. The following are the NPR's suggested actions within

those five themes that ultimately served to set the groundwork for the FAR Part 15

Rewrite:

*a) Move to Guiding Principles from Rigid Rules*

The FAR and agency acquisition supplements total over 4,500 pages in length. Certainly, it is a very complex and process-oriented document, prescribing in detail the desired actions of a contracting officer. Unfortunately, it also leads to burdensome and inefficient purchasing. Citing a survey conducted by the Merit Systems Protection Board (MSPB), the NPR said "too many procurement regulations...are so process-oriented that they minimize contracting officer discretion and stifle innovation." [Gore *Reinventing Federal Procurement* 1993, 12] In contrast, the best practices of corporations and other Governments emphasize replacing detailed controls with broad guidelines and accountability for results.

In order to reduce the burden of the statutory and administrative processes contained in the procurement regulations, the NPR recommended converting the FAR from rigid rules to guiding principles. These guiding principles—clearly and simply stated—would provide flexibility for employing sound business judgment, allow for efficient procurement, and form a foundation for holding managers accountable for results. [Gore *Reinventing Federal Procurement* 1993, 13; Preston 1995, 44-45; Welsh 1994, 21]

*b) Get Bureaucracy Out of the Way*

Here, the NPR's position on protests is revealing when discussing a change in attitude regarding the role of the Federal procurement system. Although protests play an important role in addressing offeror's grievances, the fear of protests has had an unwanted effect on the procurement process. Contracting officers, mindful of the significant delay a protest can impose, are more concerned with meticulously documenting compliance with every rule and procedure than providing goods and services to the customer. The result is an unresponsive procurement system that requires excessive resources and time in order to make a purchase.

Similarly, the NPR recognized a cost due to satisfying every concern of a disappointed bidder, and stated the Government could no longer afford these costs in the current climate. Notably, the NPR also recommended expanding communications between buyers and sellers, a change that formed a core part of the FAR Part 15 Rewrite.

[Gore *Reinventing Federal Procurement* 1993, 39]

*c) Center Authority and Accountability with Line Managers*

The NPR's central purpose in this section was to assert the need for procurement professionals to work with line managers in meeting mission goals. Although the majority of this section highlighted the need for purchase cards and customer-focused procurement, the initiative on procurement ethics is relevant to this study. Here, as in the previous section, the NPR reiterated the need for expanded communications between the Government and offerors. They cited the "chilling effect on

legitimate and necessary discussions and exchange of information" that the current integrity laws have on the process. The result has been a reluctance on the part of both Government and industry to pursue even routine information without authorization. In order to correct this problem, the NPR recommended clarifying and simplifying the existing ethics laws. [Gore *Reinventing Federal Procurement* 1993, 65-66]

Again, this helps us to understand the attitudinal shift towards greater efficiency, even at the expense of absolute fairness. Here, the NPR recognized the cost of accounting for every possibility, and that tradeoffs were needed to keep these rising costs down.

*d) Create Competitive Enterprises*

Although this section does not directly address reforms that were ultimately realized in the FAR Part 15 Rewrite, it does address the subject of competition. The NPR went so far as to state that the benefits of competitive sourcing are "perhaps the most powerful means available for keeping suppliers efficient and responsive." This formed the basis for recommending an opening of Federal, state, and local governmental supply schedules for use by all Government agencies. Here, in striving to maximize the benefits of competition, the NPR also suggested maximizing purchasing power by cooperating on procurements, where possible. [Gore *Reinventing Federal Procurement* 1993, 71]

e) ***Foster Competitiveness, Commercial Practices, and Excellence in Vendor Performance***

In this, the fifth and final section, the NPR made its most emphatic statements concerning reforms to the source selection system. Here, four of the eight initiatives that were detailed in this section are particularly relevant to the FAR Part 15 Rewrite.

(1) Foster Reliance on the Commercial Marketplace. In order to accomplish greater reliance, however, the Government would have to counter a revealing fact: many companies do not compete for Government contracts due to the costly and complex rules and procedures the Government imposes. Similarly, companies that do have Government contracts often establish separate staffs and functions just to deal with the unique and expensive characteristics of the contracts. Obviously, this creates two problems: (1) the competitive pool is reduced, and (2) those left in the competitive pool are more expensive due to the added costs of receiving a Government contract. Considering the shrinking industrial base and DoD's need for the latest technology, this was seen as an untenable situation, and one that must be reversed. [Gore *Reinventing Federal Procurement* 1993, 79]

(2) Encourage Best Value Procurement. This recommendation was a reflection of private sector best practices and ideas espoused by total quality management practitioners. Here, the NPR highlighted a core tenet of commercial buyers: that awarding contracts solely on lowest price "can be a false economy if there is

subsequent default, late delivery, or other unsatisfactory performance resulting in additional...costs." Similarly, the NPR asserted that "acquisition strategies designed to support and foster the quality revolution need to be promoted and used to the fullest extent." The NPR went on to state that it is the taxpayers and the agencies that should come first, not the needs of a vendor. Although all vendors should be treated fairly in the procurement process, the end goal is best value for the Government. To that end, the NPR recommended revising the FAR to "minimize complexity and provide for a streamlined process" in order to ensure that the Government receives best value. [Gore *Reinventing Federal Procurement* 1993, 87-89] Certainly, many of the thoughts and principles set down here formed the foundation of the FAR Part 15 Rewrite.

(3) Promote Excellence in Vendor Performance. This recommendation further reinforced the NPR's central theme of greater efficiency through quality improvement. A common-sense idea championed by Dr. Edward Deming, maintaining quality suppliers is a fundamental part of any organization's success. As the NPR stated, "past performance plays a crucial role in vendor selection in the private sector." [Gore *Reinventing Federal Procurement* 1993, 91] Once again, the emphasis was on using commercial best practices as a model for ensuring efficient acquisitions.

(4) Authorize a Two-Phase Competitive Source Selection Process. Here, the NPR continued to relate the current procurement process to the unnecessary expenditure of resources—both Government and industry. For instance, where discussions are held with all responsible sources, those who, from the beginning, had

little chance of winning needlessly incur proposal and negotiation costs. Similarly, the Government must maintain the infrastructure and support necessary to evaluate all of the proposals and conduct discussions with each, irrespective of whether a proposal has a reasonable chance of receiving the award. Citing a similar commercial practice, the NPR advocated conducting a competitive source selection in two phases. First, require limited proposals in the initial phase. Then, evaluate those limited proposals and invite no more than five offerors to submit full-blown proposals. Second, evaluate the detailed technical and price proposals from those five offerors, and then conduct discussions if needed to determine final award. As will be seen in the next chapter of this study, the NPR's recommendations in this area had a significant impact on the policies established by the FAR Part 15 Rewrite. [*Gore Reinventing Federal Procurement* 1993, 95-96]

## **E. PROCUREMENT PROCESS ACTION TEAM**

### **1. Origin**

On October 13, 1994, the Federal Acquisition Streamlining Act (FASA) was signed by President Clinton. Although it codified many of the recommendations of the NPR—particularly regarding commercial items and simplified acquisitions—it failed to address many of the issues concerning streamlining negotiated source selection. [*Highlights of the FASA*, 1994, 1; Welsh 1995, 43; Hiestand 1994, 25] Accordingly, on October 17, 1994, a Process Action Team (PAT)—established by the Under Secretary of Defense (Acquisition & Technology)—began its procurement reform effort with the following goal: "...to re-engineer specific elements of the procurement process within

DoD to make it more efficient and effective, while balancing the nation's social and economic goals and ensuring the integrity of the process." [Charter for the Process Action Team 1994, 1]

In pursuing this goal, the PAT was to be guided in its efforts by three principles:

- (1) Ensure the procurement process is streamlined, flexible, customer-focused, and reflects continuous process improvement;
- (2) Balance policy needs with efficiency and cost savings, manage risks instead of avoiding them, and encourage innovation; and
- (3) Eliminate non-value added activities, and minimize intrusive oversight where required to be performed to protect the public trust. [Charter for the Process Action Team 1994, 2]

## **2. Recommendations**

Building on the groundwork established by the NPR, the Procurement PAT made a number of specific recommendations in order to improve efficiency in source selection. Those relevant to this study are included below.

### **a) *Prequalify sources***

Here, the PAT recommended following the commercial practice—in certain industries—of prequalifying sources. Notably, the PAT restricted their endorsement of this technique to situations where there are a large number of available suppliers and the good or service is based on an industry standard. More relevant to the FAR Part 15 Rewrite, however, is the PAT's recommendation to conduct presolicitation

screenings in order to limit the actual solicitation to qualified sources. Notably, the PAT did not find this incompatible with the requirement for full and open competition. Rather, they stated "multiple offers from firms that are not qualified to perform and have no real opportunity [to win] does not constitute true competition." [Report of the Process Action Team 1995, 3-26]

*b) Expand Definition of Clarification*

Continuing a thought established by the NPR, the PAT also recommended an expansion of the definition and use of the term "clarification." As existed, a minor deficiency had to be resolved through a protracted process that included establishing the competitive range, holding discussions, and re-evaluating the proposals. Naturally, this led to higher costs and lead time for both the Government and the suppliers. The PAT suggested that "clarification" could be used for "correction of minor deficiencies in a proposal that otherwise would be in line for award on initial offers or following best and final offers." [Report of the Process Action Team 1995, 3-60]

*c) Revise Criteria for Competitive Range*

This recommendation was a response to the costs and delays that resulted from setting a broad competitive range. In addition, the PAT said that this problem was likely to worsen, given the increased number of offerors expected due to the emphasis on commercial items and electronic contracting. Stating that "broad competitive ranges which include even doubtful offers is a form of risk avoidance," the PAT asserted that the focus should be on risk management. In that regard, they recommended limiting the

competitive range to those having a "reasonable chance" for award. Additionally, they stated that this was not at odds with CICA's mandate for full and open competition. Rather, the solicitation would still be performed according to CICA, but only those who submitted their best offers—both technical and price—would be included in the competitive range. This would incentivize offerors to submit competitive proposals the first time, and prevent them from trying to "make right" a poor proposal during negotiations. [Report of the Process Action Team 1995, 3-63]

*d) Preliminary Down-Select Large Number of Proposals*

This recommendation aimed to achieve the same purpose as the previous one: reduce cost and procurement time by limiting the competitive range. Here, the PAT advocated using a preliminary evaluation step to quickly eliminate those proposals not having a reasonable chance of award. Recommended for use when a large number of proposals are anticipated, it would prevent the expensive practice of fully evaluating all proposals that are received. Similarly, noncompetitive offerors would save money by finding out earlier in the process that they are unlikely to win the award. Accordingly, they could disband their proposal preparation teams and concentrate on other, more competitive areas. [Report of the Process Action Team 1995, 3-66]

*e) Competitive Range of One*

A recurring thought promoted by all of the groups and studies advocating acquisition reform is that the existing procurement regulations and culture cause unintended results. A case in point is where a contracting officer will retain an additional

offeror in the competitive range in order to show competition, even though that offeror does not have a realistic chance of winning the award. Unfortunately, that contractor's effort and expense are wasted by keeping them in the process. Whether done to prevent the need for cost and pricing data or to mitigate the threat of protest, the end result is the contractor wastes valuable resources. The PAT addressed this problem by recommending authority to limit the competitive range to one offeror "when that offeror is clearly superior and no other offeror has a reasonable chance for award." [Report of the Process Action Team 1995, 3-69]

*f) Maximum Emphasis on Award on Initial Offers*

Echoing the belief that there is a "cultural bias that...encourages PCOs to enter into discussions...as a means of risk avoidance," this PAT recommendation focused on risk management. Here, where the solicitation has stated an intent to award on initial offers, the contracting officer should do so rather than invest the time and resources involved with setting a competitive range and conducting discussions. As long as the offer meets the terms of the solicitation, is technically acceptable, is fair and reasonably priced, and represents best value, the contracting officer should make the award without discussions. [Report of the Process Action Team 1995, 3-83] Once again, the PAT stated that contracting officers and agencies must understand the costs of risk avoidance, and must become more business-like and efficient in their purchases.

## **F. FEDERAL ACQUISITION REFORM ACT**

The Federal Acquisition Reform Act (FARA) is the statutory authority for many of the changes made by the FAR Part 15 Rewrite. It provides the language and the legislative guidance, in conjunction with the ideas discussed throughout the past two chapters, that were used by the Part 15 writers in helping craft revisions to the existing regulations. That said, the next chapter will discuss in detail the major changes that were made to the FAR Part 15. This chapter then, will limit discussion to the actual legislation that was enacted, and will reserve analysis of the different areas for the following chapter.

### **1. Origin**

On February 10, 1996, President Clinton signed the National Defense Authorization Act for Fiscal Year 1996, PL 104-106. The Act contained two acquisition reform provisions: (1) Division D: Federal Acquisition Reform Act of 1996, and (2) Division E: Information Technology Management Reform Act (ITMRA) of 1996.\* Of the two provisions, FARA focused on capturing and codifying the various recommendations concerning acquisition reform. To that end, FARA desired to provide statutory support for many of the acquisition reengineering initiatives proposed since the enactment of CICA.

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\* FARA and ITMRA were renamed the Clinger-Cohen Act of 1996 by Section 808 of the Omnibus Consolidated Appropriations Act of 1996 (PL 104-208), signed by President Clinton on September 30, 1996. [Federal Contracts Report 1996, 66:362] Since FARA is the provision that is relevant to this study and is distinct from ITMRA, the term "FARA" will be used hereinafter.

## **2. Genesis and Formulation**

One of the goals of the FARA legislation was to address the efficiency of CICA, and whether CICA led to expensive, untimely, and burdensome procurement practices as currently practiced. [*Federal Contracts Report [FCR]* 1995, 63:217] Here, the issue was the competitive range and conducting efficient competitions.

**a) *HR 1388 and S 669 - Administration version***

On April 4, 1995, House Resolution (HR) 1388 and Senate version (S) 669 were introduced by lawmakers on behalf of the administration. The proposed legislation, titled the Federal Acquisition Improvement Act (FAIA) of 1995, was intended to give contracting officers increased discretion in conducting source selection. In requesting greater flexibility, the bill captured many of the ideas put forth by the NPR regarding independent and creative thinking. As for competition, it sought to allow contracting officers to limit the competitive range in order to "permit an efficient award...[but] may not be limited to less than three." [U.S. House *FAIA of 1995*, H.R. 1388 1995, Sec. 1012]

**b) *HR 1670 - Clinger and Spence***

On May 18, 1995, Reps. William Clinger (R-PA) and Floyd Spence (R-SC) introduced HR 1670. Ellen B. Brown, one of the key drafters of the bill and a Clinger aide, stated:

...[HR 1670] achieves the thrust of what the administration wants in the way of procurement reform. It puts government procurement on a more commercial footing, pushes decision-making down to the lowest possible

level, and revamps the protest process to be more efficient and less adversarial. [FCR 1995, 63:641]

The bill's summary also described the system as too costly and too bureaucratic, and that it failed to meet the needs of industry and taxpayers.

Competition was specifically discussed in the summary of the bill, where the sponsors stated that the Government "can no longer afford competition for the sake of competition." [FCR 1995, 63:643] To that end, the bill also called for replacing the CICA standard of "full and open competition" with a "maximum practicable" competition standard. Notably, HR 1670 excluded the administration's request, which was submitted via HR 1388, for authority to limit the competitive range to as few as three for purposes of efficiency. [U.S. House *FARA*, H.R. 1670 1995, Sec. 101]

c) ***HR 1795 - Collins amendment***

On June 8, 1995, Rep. Cardiss Collins (D-Ill) introduced HR 1795, which proposed to retain the current CICA standard for full and open competition. Citing a concern that the "maximum practicable" standard proposed in HR 1670 "could actually result in less competition, and thus promote favoritism in Federal procurement," HR 1795 desired to retain the existing standard. [FCR 1995, 63:710]

On September 14, 1995, the House passed HR 1670, but rejected language proposed by the Collins amendment. Instead, they adopted Government Reform and Oversight Committee language requiring full and open competition with open access, while allowing the efficient fulfillment of requirements. [FCR 1995, 64:227] Notably, this legislation was focused on amending CICA itself, rather than the FAR.

*d) HR 1530 - FY96 Defense Authorization Bill*

On October 20, 1995, House staff presented their Senate counterparts with a proposal concerning HR 1670. Rather than change the CICA standard though, the proposal recommended changing the FAR with regard to the implementation of full and open competition. Here, the FAR would implement the standard "in a manner that is consistent with the need to efficiently fulfill the Government's requirements." [FCR 1995, 64:367]

On December 13, 1995, the new language was accepted when the House and Senate conferees approved the HR 1670 conference report and bill language as part of HR 1530, the Fiscal Year 1996 Defense Authorization Act. [U.S. House and Senate *Conference Report* 1995, Sec. 4001] Two months later, on February 10, 1996, President Clinton signed it into law.

**3. Legislation**

A copy of FARA is included at the Appendix. The following is a summary of the key sections with regard to this study:

*a) Section 4101 - Efficient Competition*

This section states that the FAR shall ensure the requirement to obtain full and open competition is implemented in a manner consistent with the need to satisfy the Government's requirements efficiently. As mentioned above, this does not change the definition or the requirement for full and open competition.

**b)      *Section 4103 - Efficient Competitive Range Determinations***

Section 4103 states that a contracting officer may limit the number of proposals in the competitive range if the number of proposals that would otherwise be included exceeds the number at which an efficient competition can be conducted. In order to employ a reduction for efficiency, the limitation on the competitive range must be in accordance with the solicitation criteria. Similarly, the contracting officer must leave in the competitive range the greatest number of proposals that will permit an efficient competition among the most highly rated offerors. Of course, the competitive range determination must only be made after the initial evaluation of proposals on the basis of cost, quality, and other factors specified in the solicitation. [Key Provisions in the FAR 1996 1996, 1]

**G.      REWRITING THE FAR PART 15**

As stated earlier, the next chapter will analyze the major changes made to the FAR Part 15. There, many of the issues and problems identified during formulation of the Rewrite will be addressed. This section then, will simply provide a review of the mechanics and scope of the rewrite process.

Originally, the Rewrite was to be broken up into two phases. The first set of proposed rules—Phase I—was published for public comment on September 12, 1996. [FAR Part 15 Rewrite: Advance notice 1995; FAR Part 15 Rewrite: Proposed rule and notice 1996] In addition, two public meetings were held—one in Washington, D.C. and

one in Kansas City, MO. When the public comment period ended on November 26, 1996, 1,541 comments had been received from 100 respondents.

As a result of the large number of comments received, the FAR Council decided to issue a revised proposed rule. The revised version—consisting of a modified Phase I that reflected the public's suggestions and comments, and the previously unpublished Phase II—was issued on May 14, 1997. Published in the *Federal Register*, it established July 14, 1997, as the expiration of the public comment period. [FAR Part 15 Rewrite: Proposed rule with request 1997] When the comment period ended, 841 comments had been received from 80 respondents.

As a result of these forums and others such as the on-line Acquisition Reform Network, the writers were able to consider a large number of concerns regarding the proposed changes. [FAR Part 15 Rewrite: Request for Comments 1995; Can Feds and Vendors Talk? 1996; Power 1996] Finally, on September 30, 1997, the final rule was issued. Although the effective date of the new rule was October 10, 1997, implementation did not become mandatory until January 1, 1998. [FAR; Part 15 Rewrite; Contracting 1997, 51224]

## **H. SUMMARY**

This chapter detailed the major political and legislative influences that have impacted the FAR Part 15 Rewrite. Here, the study identified the beliefs and principles that were the most prominent in shaping changes to the existing legislation. Notably, reform initiatives regarding the Federal acquisition system invariably lead to the same

conclusions: the system is inefficient, expensive, and slow; it must improve in the face of increasingly constrained resources; and it must adopt tested and proven best commercial practices in order to gain needed efficiencies.

In Chapter II, this study established the pre-Rewrite policies and intent concerning competition and Federal procurement. In Chapter III, the study discussed the major external and commercial influences that have helped shape current acquisition reform efforts. Lastly, in this chapter, the Government's internal efforts to re-shape procurement were discussed. In the next chapter, the study will look at the major changes that were made to the FAR Part 15 with regard to competition, and provide insight into the issues and projected problems surrounding the changes.

## **V. KEY CHANGES TO NEGOTIATED SOURCE SELECTION**

### **A. INTRODUCTION**

Although FARA provided the statutory authority for many of the changes made to negotiated source selection, it was still up to the drafters to form the implementing language. It was their responsibility to form effective regulations, and to do so through consideration of public comments, previous acquisition reform efforts, and input from Government agencies—in addition to legislative direction. The following provides a succinct statement of the drafters' overarching purpose in revising the FAR Part 15:

The goals of this rewrite are to infuse innovative techniques into the source selection process, simplify the process, and facilitate the acquisition of best value. The rewrite emphasizes the need for contracting officers to use effective and efficient acquisition methods, and eliminates regulations that impose unnecessary burdens on industry and on Government contracting officers. [FAR; Part 15 Rewrite; Contracting 1997, 51224]

Certainly, this statement embodies many of the reform ideas spelled out in previous chapters, but achieving those goals would take more than simply passing the supporting legislation. So FARA, rather than culminating the transition to streamlined source selection, became a starting point for the ultimate changes that were made to the FAR Part 15. From the time FARA was passed on February 10, 1996, until the final Part 15 rule was issued on September 30, 1997, there was significant debate concerning the final wording of the new regulations.

This chapter, therefore, will discuss the three major changes affecting competition that the researcher has identified, and analyze the key issues and projected problems

associated with those changes. Of note, although there were many more issues involved with the evolution of the Rewrite, the issues discussed here are currently relevant. They are either unanswered or created, according to critics, by the new rules.

## B. DETERMINING THE COMPETITIVE RANGE

### 1. What changed

Prior to the Rewrite, the FAR made a controlling statement concerning establishment of the competitive range: "The competitive range...shall include all proposals that have a *reasonable chance* of being selected for award. When there is doubt as to whether a proposal is in the competitive range, the proposal should be included." (emphasis added)[*old* FAR 15.609(a)]\*

This criterion "when in doubt, leave them in" resulted in contracting officers setting a very broad competitive range. Since all proposals with a "reasonable chance" of award had to be included, contracting officers were reluctant to exclude all but clearly inferior proposals.

The new rule makes a major change to the criterion for determining the competitive range. In contrast, the controlling statement in the new rule is that "...the contracting officer shall establish a competitive range comprised of all of the *most highly rated* proposals, unless the range is further reduced for purposes of efficiency..." (emphasis added)[FAR 15.306(c)]

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\* In order to distinguish between the previous source selection rules and those changes made under the FAR Part 15 Rewrite, the older version of the FAR will be noted by preceding the reference with the following: *old*.

Here, the focus shifts from including those with a "reasonable chance" to including those that are the "most highly rated." This is a tremendous change for both the contracting officers and industry, and provides a strong incentive for offerors to submit a strong initial proposal. Now, initial proposals will be first evaluated against the solicitation criteria, and then a competitive range established on the basis of that evaluation. So initial proposals, rather than serving as an entry point to discussions, will be a critical first step in reaching discussions with the Government.\* This will force offerors to submit competitively priced, technically sound, and clearly stated proposals at the start of the evaluation process. The intent is to narrow the number of offerors quickly to those that are likely to win, saving money and time for all concerned.

## **2. Key issues**

As was mentioned previously, the FAR Part 15 Rewrite involved substantial public comment and input from various stakeholders, both industry and Government. Although the drafters attempted to satisfy all of the concerns, it is inevitable that changes of this magnitude would result in criticism. The following are the four key issues related to the contracting officer's determination of the competitive range:

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\* The FAR Part 15 Rewrite introduced new terms and criteria regarding the transfer of information that is subsequent to the contracting officer receiving proposals. Now, the umbrella term "exchanges" encompasses three categories: (1) clarifications, which are limited to those situations where award can be made without discussion; (2) communications, which are exchanges leading to establishment of the competitive range; and (3) discussions, which is the negotiation process which occurs after establishing the competitive range. Communications will be covered in greater detail later in this chapter, as it is a fundamental aspect of the changes made to competition.

*a) Excessive discretion*

Those people who are accustomed to Government contracting—whether contracting officer or industry—are used to a well-defined and predictable FAR. "Rules may be burdensome, but they also provide standards, precedent and consistency." [Burman 1997] With the FAR Part 15 Rewrite, an attempt was made to inject greater flexibility and responsiveness into the contracting process. Naturally, this has caused great concern among those who already feel contracting officers have too much discretion, and prefer instead the control of a prescriptive regulation.

Critics charge that the rules reverse longstanding principles of the acquisition system. The U.S. Chamber of Commerce echoed this thought, stating that "you can't take business practices and put them into the public sector." [Muradian Opposition Turns 1997] Similarly, the American Bar Association was concerned with the impact of changes on the existing rules, citing that "somewhat less accountability and visibility into the procurement process" could result. [ABA, Section 1996] Others in industry cited the possibility that "cronyism and other old abuses may creep back into Federal purchasing" with expanded contracting officer discretion. [Behr 1997] Finally, some watchers stated that the increased discretion might increase, rather than decrease, the demands on the contracting officer. Here, the argument is that contracting officers will no longer be able to rely on the certainty of systematic rules, and will be forced to develop more commercial-like skills and sophistication. [*The Government Contractor* 1997, 466]

Supporters of increased discretion say that without changes to the current system, procurement savings due to greater efficiencies are impossible. Unless contracting officers are given the flexibility that is inherent in sound business practices—practices seen as the key to cost savings and timely purchases—there can be no fundamental change in the way Government procurement operates. [U.S. House *Prepared Statement of Steven Kelman* 1997; Forum Comments 1996; Little, Fairness 1996] The OFPP Administrator, Steven Kelman, also noted that the FAR Part 15 Rewrite seeks to manage risk, instead of avoid it behind a complex layering of rules and regulations. Here, he criticized those who are anxious to embrace risk management principles in areas where they are likely to benefit, such as contract administration and accountability issues like TINA, but to seek risk aversion in source selection. [FCR 1996, 66:228] He also made a parallel between the two functions, arguing that if Government "contracting personnel are not competent to make source selection decisions, then they are not competent to make other contracting decisions, such as exemption decisions under TINA." [*The Government Contractor* 1996, 528]

As you will see during this chapter's evaluation of the major changes and issues, small business interests and the ABA voiced many of the concerns raised about the new rule. Interestingly, these two groups were seen as being net losers with the changes—the ABA due to fewer protests, and small business due to diminished regulatory protections. [Muradian, ABA & Chamber of Commerce Oppose 1996]

*b) Diminished competition*

Critics also assert that the "reasonable chance" standard for inclusion in the competitive range should be retained. In the new rule, "all of the most highly rated" proposals make up the competitive range, unless it is further reduced for efficiency. Dissent in this area focuses on the mandate of CICA for full and open competition; and whether a reasonable possibility for award should ensure inclusion in the competitive range. Here, critics argue that proposals, and often the Government's needs, change during the course of discussions, so if offerors with a "reasonable chance" of award are unable to conduct meaningful discussions, then competition is decreased. [Petrillo, In its final unveiling 1997] In fact, according to detractors, the Government should be looking for ways to expand the competitive range, rather than trying to limit it. [*The Government Contractor* 1996, 450; Friel 1997]

Backers of the new criterion point to the need "to be more realistic in making competitive range determinations, and not to lead offerors on." [U.S. House *Prepared Statement of Steven Kelman* 1997] Leaving an offeror that has little chance of award in the competitive range wastes the resources and time of both the company and the Government. Since the Government must negotiate with every offeror that is in the competitive range, each addition represents an increase in cycle time and cost. As the OFPP Administrator stated, "There is no great honor to be included in the competitive range and not get the award." [FCR 1997, 68:126] By informing offerors as early as possible concerning their likelihood of award, the companies are better able to make

informed decisions concerning where and when to expend their bid and proposal (B & P) costs.

Finally, the new rule confirms that all of the proposals that are received will be evaluated against the solicitation criteria prior to making any competitive range determination. In the initial stages of the FAR Part 15 Rewrite, there was doubt as to whether every proposal would be objectively reviewed if the solicitation established a competitive range. This led to vocal dissent concerning the competitive range and CICA's full and open competition mandate. [FCR 1996, 66:267] This idea was quickly squelched, however, and the Rewrite drafters affirmed that every proposal would be initially evaluated prior to setting the competitive range.

c) ***Unable to revise proposals***

Here, dissent focuses on the new rule's emphasis regarding the initial proposal. In the past, a contractor would wait until after discussions to tender its most competitive offer—the Best and Final Offer (BAFO). This was largely driven by the "reasonable chance of award" standard that ensured essentially all offerors would be admitted into the competitive range. Critics argue that by now focusing on the initial offer, competition is diminished because some offerors will be eliminated earlier than they would have under the old rules. [FCR 1996, 66:115] The critics also state that "vendors' relative positions in competitive procurements can change significantly as proposals are revised," and the old rule recognizes this fact. [U.S. House *Prepared Testimony of James R. Klugh* 1997]

Backers of the FAR Part 15 Rewrite say that this inability to obtain competitive initial proposals is a critical reason for changing the competitive range standard. "No longer will contractors be content to submit mediocre proposals in the hopes of becoming more competitive after discussions." [*The Government Contractor* 1996, 371] Now, contracting officers will be able increasingly to award without discussions. Also, the rule will increase the quality of discussions, which will greatly benefit those left in the competitive range. Fundamentally, it is expected to dramatically shorten the procurement time and the costs involved with multiple discussions. [U.S. House *Prepared Statement of Steven Kelman* 1997]

*d) Small businesses will suffer*

As mentioned previously, small business interests were among the most vocal opponents of the new rules, and espoused many of the opposing views expressed in the above paragraphs. In terms of the specific impact on small businesses, they assert that limiting the competitive range will cause contracting officers to steer awards to more established and recognized contractors. They also point to a contracting officer's relative unfamiliarity with a small business as compared to a large firm, stating that the contracting officer will be reluctant to exclude a large, established defense contractor. [*FCR* 1996, 66:486] Similarly, they contended that the FAR Part 15 Rewrite might even conflict with the Small Business Act's mandate regarding small business participation in Government procurements. [*FCR* 1997, 67:209]

In contrast, supporters of the Rewrite argue that the new rules will help, not hurt small businesses. They point out that early and honest feedback regarding a firm's likelihood of award saves B & P costs, makes the process more commercial-like, and enhances cash flow by reducing the time to award. By limiting the competitive range, firms "do not spend financial resources on projects for which they are not qualified," and can instead direct their efforts to opportunities where they are more competitive. [U.S. House *Prepared Testimony of Michael A. Postiglione* 1997]

### C. REDUCING THE COMPETITIVE RANGE FOR EFFICIENCY

#### 1. What changed

The concept of an efficient competitive range was established by FARA. Although on the surface this is a new aspect of the source selection process, it is consistent with the underlying tone and goals of the Rewrite. This is particularly evident when a comparison is made between the purposes and objectives of the old and new rules. The old rule sets forth the following purpose:

Source selection procedures are designed to —

- (a) maximize competition;
- (b) minimize the complexity of the solicitation, evaluation, and the selection decision;
- (c) ensure impartial and comprehensive evaluation of offerors' proposals; and
- (d) ensure selection of the source whose proposal has the highest degree of realism and whose performance is expected to best meet stated Government requirements. (emphasis added)[*old FAR 15.603*]

In contrast, the new rule provides a very concise statement of purpose: "The objective of source selection is to select the proposal that represents best value." [FAR

15.302] This signals a significant shift in emphasis and direction regarding the accomplishment of source selection. Although competition remains a key aspect of procurement policy, the new rule requires that competition be achieved efficiently:

Contracting officers shall provide for full and open competition through use of the competitive procedure[s]...best suited to the circumstances of the contract action and consistent with the need to fulfill the Government's requirements *efficiently*. (emphasis added)[FAR 6.101(b)]

In practice, the new rule allows the contracting officer, after initially evaluating all proposals and establishing a competitive range, to reduce further the competitive range for the purpose of efficiency. Of course, the solicitation must notify offerors that this option is available. [FAR 15.306(c)(2)]

## 2. Key issues

The debate surrounding efficiency and efficient competition is centered around three issues. Those issues are as follows:

### a) *"Efficient" is not defined*

Here, opponents were concerned with the application of "efficiency" by contracting officers. Rather than leave this up to the "unchecked discretion" of the contracting officer, they wanted the FAR to define what constitutes an efficient procurement, and to "specify the factors to be considered" in reducing the competitive range for efficiency. [FCR 1997, 68:46] Absent regulations and rules that direct contracting officers in the use of efficiency, critics argued that the result would be less—not more—competition. [U.S. House *Prepared Statement by Tom Frana* 1997]

Similarly, dissenters asserted that a lack of agency resources should not be enough to limit the competitive range. [FCR 1996, 66:340]

In response, supporters counter that a rigid definition of efficiency will only undo the very reason for its existence. If contracting officers are required to provide extensive documentation and analysis prior to setting an efficient competitive range, the effect will be to dissuade contracting officers from ever using this tool. Instead of managing risk, they will want to avoid it due to the threat of protest and litigation. Since efficiency is situational, it would be inappropriate to draw sharp boundaries on exactly what is and is not efficient. [FAR; Part 15 Rewrite; Contracting 1997, 51228] Rather, efficiency should depend on the varied factors of a specific procurement: complexity, urgency, etc. Notably, this goes hand-in-hand with the need for greater contracting officer discretion; flexibility and authority are needed to ensure the Government can efficiently conduct procurements.

**b) *Should be minimum number in the post-efficiency competitive range***

Following a similar argument as that expressed above, critics, primarily small business interests, are concerned that there is not a regulatory requirement to include a minimum number of offerors in the competitive range. Here, they contend that the FAR Part 15 Rewrite's failure to specify how many offerors must be included in the competitive range after it has been reduced for efficiency damages competition. They note that absent this regulatory direction, contracting officers could conceivably establish

a competitive range of as few as two offerors. [FCR 1996, 66:268; *The Government Contractor* 1996, 528]

Supporters are quick to cite agency data that show award is almost never made to offerors that are not initially evaluated as being among the top three. Here, a review was conducted of competitively negotiated contracts awarded by National Aeronautics and Space Administration (NASA), Department of Treasury (DOT), Department of Energy (DOE), and DoD. This review, which encompassed 770 contracts awarded during the period of FY1995 through FY 1997, showed that none of these contracts were awarded to contractors that were not among the top three in the initial competitive range. [FCR 1997, 68:126]

Finally, proponents of the new rule remind critics that an expanded competitive range—expanded by offerors with little chance of winning—unnecessarily leads to increased costs and a longer procurement cycle time. Not only would this waste the Government's resources, but it would also waste the resources of those offerors that are kept in the competitive range just to satisfy a minimum size would suffer. In effect, setting a minimum for the competitive range would unravel many of the gains the new rule would provide, and would return the system to a reliance on bureaucratic procedures and regulations. Rather than set a rigid minimum, the contracting officer should have the discretion and the flexibility to assess the situation, and then make a competitive range decision based on the particular facts of the procurement. [U.S. House *Prepared Statement of Steven Kelman* 1997]

c) ***Supplants fairness***

Detractors of the new rule also assert that fairness is being subverted to efficiency. Although they concede that procurement reform is needed and has many benefits, they question whether the gains are enough to offset the perceived negative impact on fairness. [U.S. House *Prepared Statement of Jere W. Glover* 1997; *The Government Contractor* 1996, 578; *FCR* 1997, 67:332] Echoing the concern of small businesses, Jody Olmer, the director of domestic policy at the U.S. Chamber of Commerce, stated "As long as the U.S. Chamber of Commerce is in Washington, D.C., Government efficiency is never going to be elevated above fairness." [Muradian, ABA & Chamber of Commerce Oppose 1996] Notably, critics often equate a fair system with one which retains the requirements and processes implemented subsequent to CICA. Contending that "FARA specifically subordinates efficiency to the requirement for full and open competition," they say that the FAR Part 15 Rewrite raises efficiency over fairness. [HHGFAA 1997]

In contrast, supporters argue that fairness will not suffer, and that CICA's requirement for full and open competition is unchanged. Noting that all offerors are invited to submit proposals and that those proposals will be evaluated against the criteria before setting the competitive range, they state that the full and open mandate is unaffected. [*FCR* 1996, 66:225; FAR 15.306(c)] Interestingly, the testimony of Steven Kelman, the OFPP Administrator, included a revealing quote by Chris DeMuth, head of

the Office of Information and Regulatory Affairs under President Reagan. In supporting the FAR Part 15 Rewrite, DeMuth made the following statement:

It is quite ludicrous that the current procurement system is justified in the name of 'competition,' as it systematically produces a mutant form of 'competition' entirely unknown in private markets....It all looks to me like the starker form of protectionism on behalf of those who benefit from the current inbred system of overregulation and endless litigation. [U.S. House *Prepared Statement of Steven Kelman* 1997]

## D. COMMUNICATIONS

### 1. What changed

As previously mentioned, the FAR Part 15 Rewrite expanded the means by which contracting officers could exchange information with offerors. The term "communications" is a new concept, and has the greatest impact on competition and setting the competitive range among the three categories under exchanges: clarification, communications, discussions. Previously, there were two ways of gaining needed information: minor clarification or discussion. [*old FAR 15.601*]

The new rule is an attempt to increase the flow of information between contracting officer and offerors, allowing for a more timely and informed decision concerning establishing the competitive range. Furthermore, the express purpose of "communications" is to allow establishment of the competitive range, and so it is inappropriate for making an award without discussion. Finally, the new rule states that communications (1) shall be held with those offerors whose past performance determines their inclusion in the competitive range, and (2) may only be held with offerors—other

than those in category (1)—whose proposal is neither clearly in or out of the competitive range. [FAR 15.306(b)]

## 2. Key issue

Since the concept of communications is built on increased discretion, the debate in this area centers around how contracting officers might use this enhanced flexibility, and whether it could lead to abuses. The following is a discussion of this key issue:

### a) *Unfair practices*

Due to the flexibility of communications, critics argue that offerors might receive disparate treatment. Since the new rule does not require contracting officers to conduct communications with all offerors, there exists the opportunity for one offeror to receive more extensive communications than another. Since communications are for the express purpose of determining an offeror's inclusion in the competitive range, the scope and extent of communications is critical to the establishment of the competitive range.

[*The Government Contractor* 1997, 578; McAleese 1996, 30; Petrillo, *The FAR debate 1997*]

Notably, GAO also commented on communications and the added features of this new concept. Their suggestions to (1) more narrowly define what constitutes communication, and (2) to limit the pre-competitive range communication to those offerors who are neither clearly in or out of the competitive range, were both adopted in the final rule. Based on GAO's comments on the subject, it is evident that the use of

communications is a somewhat new and untested area of procurement law. [Muradian, Government releases 1997; Front-Line Procurement 1996]

Finally, some critics argue that there is no reason to change existing regulations in this area. They assert that discussions can serve the same purpose, and that by opening "the doors of communication...wider than before," there are fundamental issues of fairness. [The Government Contractor 1997, 578] In contrast, the Rewrite drafters are adamant in the need for more dynamic and open exchanges, and label this change the "cornerstone of all of the rest of the major policy shifts." [FAR 15 Rewrite: Notice of public meeting 1996]

#### **E. SUMMARY**

The FAR Part 15 Rewrite strives to reinvent source selection, "with the intent of *reducing the resources* necessary for source selection and *reducing time* to contract award." (emphasis added)[FAR; Part 15 Rewrite; Contracting 1997, 51224] In the new rule, the constraints of the current environment—limited budgets, shrinking industrial base, and quickly changing technologies—are evident, and the result is a procurement policy that attempts to reduce cost and time.

This chapter discussed the major changes affecting competition in the FAR Part 15 Rewrite, and the key issues and problems that surround those changes. Significantly, the new criterion for setting the competitive range changed from "when in doubt, leave them in" to "when in doubt, leave them out." Similarly, source selection was further streamlined by allowing contracting officers to reduce the competitive range for

efficiency. Finally, the new rule institutes the concept of communications, which increases the ability of both Government and offerors to exchange and transfer information. As with the new rules concerning the competitive range, expanded communications reflect many of the ideas and thoughts espoused by business reengineering advocates, both Government and commercial.

The next chapter will provide insight and perspective, from both industry and contracting officers, concerning the new rule. Here, viewpoints of the two parties will provide the foundation for assessing the advantages and disadvantages of the FAR Part 15 Rewrite in the final chapter.



## **VI. INDUSTRY AND CONTRACTING OFFICER ASSESSMENT OF THE NEW POLICY AND ITS IMPACT ON COMPETITION**

### **A. INTRODUCTION**

Although legislative debate, policy discussions, and relevant literature provide invaluable insight into a new policy, often the most revealing view is that at the working level, where the actual implementation occurs. Often, this is where the intent and purpose of a policy goes unfulfilled due to poor development, a lack of commitment, or any other number of reasons. In the case of FARA and the FAR Part 15 Rewrite, policymakers attempted to limit this possibility through substantial public debate and discussion concerning the rule's final form, a period spanning two and one-half years. That said, the perspective of the actual practitioner is indispensable in interpreting and evaluating the new policy, and will also provide an early indication of the problem areas.

This chapter will provide an assessment of the new policy by industry and Government contracting officers. In previous chapters, the study established the purpose and intent of the FAR Part 15 Rewrite, and discussed the major changes and issues related to competition in the new policy. Here, the focus will be on developing insight into the policy, and assessing its changes from the perspective of actual users.

### **B. METHODOLOGY**

As was discussed in Chapter I, the theoretical framework of this study is based on an inductive model that relies on archival data and opinion research. In previous

chapters, historical research of secondary archival data was the appropriate method—and the primary source—for evaluating the new policy. Here, in Chapter VI, the emphasis will shift to the collection and analysis of opinion research. [Buckley 1976, 35] In obtaining this portion of the required data, telephone and personal interviews were conducted with both contracting officers and industry procurement managers. Those that were interviewed comprise a diverse group of responsibilities and perspectives. The contracting officers' areas of expertise and focus range from hardware systems commands to base contracting support. Similarly, the industry interviewees work for companies that sell a wide variety of material and services to the Government and other commercial firms, including major defense programs.

The comments are grouped into two categories: (1) the macro-view of the policy concerning its perceived intent and the resultant impact on competition, and (2) the major issues—setting the competitive range, reducing for efficiency, and communications—that are seen as the most problematic regarding implementation. In presenting these data, the interviews will be referenced by numbered narratives.

## C. THE INTENT OF THE POLICY

### 1. Industry

Not surprisingly, industry procurement professionals were more conversant in the broad intent of the new policy than they were in the various, specific subject areas, e.g., communications or the criteria for making an efficiency reduction. Although they were

not subject matter experts on the newly mandated policy, they were well aware of the broader goals and changes that the FAR Part 15 Rewrite purported to make.

*a) Better business practices*

Research participants expressed uniform support of Government attempts to adopt more commercial-like procurement practices. Predictably, they see the acquisition process as slow, bureaucratic, and inefficient. One of the interviewees summed up the general attitude by stating:

Anything the Government does to get more efficient is welcome by me. Having worked with the Government for a number of years, I am constantly amazed at the time—and probably the cost, if I knew it—of buying even the simplest item. I don't know what it costs for the Government to buy an item, but I bet it's at least 50 percent more, if not double, what we can do it for. So sure, if [the new policy] does what it says it's supposed to, then I'm all for it. [Narrative #1]

*b) Increased discretion*

Although participants were enthusiastic about injecting "commercial practices" into the Government purchasing function, they were much less cavalier about the increased discretion and flexibility the rule provides. As mentioned previously, the majority of the industry participants were uncertain as to the specific details of the FAR Part 15 Rewrite. Notably, these same firms stated they had relatively few, currently ongoing negotiated procurements. That said, they knew enough about the policy changes to have attached "increased discretion" to the new rules. The following interviewee expressed some reservations about this broadened flexibility:

In order to do a good job, you have to have a certain amount of flexibility. I mean, you can't tell people every little thing to do, because if you do,

nothing is getting done and they won't want to work there. What I worry about, though, is getting a PCO that pushes up against the edge of the new rule, and has so much discretion that only [the PCO's] favorite company gets all the business. Right now, the system is flawed, but I'm not so sure the answer is more discretion. [Narrative #2]

c) *Expand pool of suppliers*

Many contractors also equated the FAR Part 15 Rewrite with industrial base problems and a shrinking defense industry. One interviewee—who had recently returned from a training conference on the subject—predicted the changes would ultimately encourage greater competition for Federal contracts:

I want to know as early as possible that I'm not competitive for an award, because I want to save my Bid and Proposal [B & P] money. The sooner I find out I'm not going to win, the better, because that lets me move on to another proposal. So in terms of costs, I save money and time through the new rules, and that lets me go for more contracts. I think that alone will increase competition, because the risk of spending a lot of money for a small chance of award goes away to some degree, which should cause more people to want to bid. [Narrative #3]

Another research participant made a comment that helps provide insight into the current system's adverse affect on competition:

Our business is split about in half, commercial and Government. Fifteen years ago, it was about ten percent commercial and 90 percent Government. We made the move [to more commercial work] because the Government sales just weren't worth it; they were less profitable and much more trouble. Between that and a busy commercial business, we decided to move away from selling to the Government. We weren't making any money on the Government—profits were low—and the contracts were expensive to get and maintain. If the [FAR Part 15 Rewrite and other reforms] could make the whole process look like my commercial work, that would be the ideal situation. Who knows, ten years from now, we might be back at our old mix. [Narrative #4]

*d) Reward good performers*

Finally, industry participants saw the new rule as another in a series of efforts to focus on best value and past performance. Partly an offshoot of the move to commercial practices and partly a continuation of previous mandates concerning best value, the FAR Part 15 Rewrite was seen as rewarding good business partners:

I want the PCO to have more flexibility to talk to me and make the best buy. To me, that's a competitive advantage. We have a good record with the Government, we feel like we have an excellent technical staff, and we feel the more they know about us, the better we're going to look.  
[Narrative #5]

**2. Contracting officers**

Federal contracting officers, many of whom had been through training sessions on the new rules and had even provided input to their agencies during the drafting stages, were cautiously optimistic about the revised procedures. Notably, their comments were focused on the added flexibility, which they saw as a subtle shift away from the existing emphasis on procedures that were prone to protest with little value-added.

*a) More discretion*

Research participants welcomed greater discretion, reasoning that increased judgment is undoubtedly a positive when conducting a negotiated procurement, which by definition demands a certain degree of flexibility. One interviewee had the following comment:

I believe that one of the reasons for the FAR Part 15 rewrite was to provide PCOs with the regulatory latitude to make business judgment calls and to allow them to define efficiency—for example—on a case-by-case basis. The GAO has not historically allowed

protests which challenge a PCO's judgement, even if the GAO didn't agree with the PCO's judgment. The thrust of the rewrite is to make the process more like that of the commercial world. It will not keep PCOs from making poor decisions, it won't keep dishonest PCOs from manipulating the system, and it won't keep the "wrong" contractor from winning the contract award—just like in private industry. [Narrative #8]

**b) *Reduce likelihood of protest***

Another research participant echoed the same thoughts, stating that the Rewrite will likely result in fewer protests and less litigation:

I think if anything, the new rules should decrease the chance of protest. Although the percentage of sustained protests is pretty small, maybe the new rules will cut down on the overall number of protests that are filed. Since the Rewrite loosens the boundaries a little bit and gives you the ability to make business decisions with a little less fear of protest, I think it's going to take away the protest from the contractor who is unhappy with the results, or protests as a matter of policy. [Narrative #9]

One interviewee offered a somewhat different twist, stating that the frequency of protests is unlikely to change. This contracting officer also mentioned the value of oral presentations, a tool that is in keeping with expanded communications and setting the competitive range. The research participant made the following comments:

I don't think it will have a significant effect on protest. First, most protests are not sustained. Those contractors that are [eliminated] in the initial down select typically do not have a firm grasp of the requirements, and will not be able to forcibly argue their case. Second, anybody with a 32-cent stamp has a shot at a protest, but contractors don't like to needlessly call foul unless they really feel slighted because it's bad business, especially under today's "teaming" environment. Finally, there is a perception that the increased use of oral presentations will decrease protest. Since contractors usually know when they "nailed" a presentation and when they didn't, protests are less likely. [Narrative #10]

Finally, an interviewee discussed how protests should not distort the competitive range, and that the contracting officer is ultimately responsible for making a good, sound competitive range decision:

We can't function if all we're worried about is getting protests. You need to make a rational decision on who is in the competitive range and document that decision well. The threat of a protest should not determine who is—or is not—in the competitive range. [Narrative #11]

c) ***Save money and time***

Some of the research participants pointed to reduced costs as part of the intent of the new rules. Here, an interviewee discussed a likely benefit of the new streamlined procedures:

I think one of the biggest reasons behind the [the FAR Part 15 Rewrite] is money. Over the last six or seven years, we've had a huge downsizing, both in people and new procurements, and it's all due to a lack of funding. When I first started working for the Government in the 80's, we had a lot of buys, and a lot more people working here. Now, the money is tight and all I ever hear about is how we have to bump up the procurement dollars. So, I think all of these acquisition reforms are primarily for saving money. [Narrative #12]

Another research participant offered a similar thought, but from a slightly different perspective:

To me, the intent [of the new policy] is about saving money, much like the credit card. With the credit card, you don't have to have as many [contract specialists], because you essentially gave their job to the user. This is just more of the same. Now, you've taken away the oversight and the rules in even the larger buys. I saw the same thing at DCMC [Defense Contract Management Command], which has gotten hit even worse than here. From talking with my friends there, they just don't have the bodies to do the same level of oversight. I know procurement reform is a hot-button topic with Congress and [OSD and Navy procurement policymakers], and

they're targeting jobs. This is just another way to downsize. [Narrative #13]

*d) Adopt commercial practices*

Other research participants talked about the move to more commercial-like business practices. One interviewee had the following comment about best practices:

All you have to do is look at the FAR and know that you're working for the Government. You can scan through almost any [section of the FAR] and see all kinds of rules and requirements that were put in by politicians to either [direct the flow of] contracts or fix some worst-case problem. If the [FAR Part 15] changes redesign the FAR, that's improvement in and of itself....The reason it takes so long to award a contract is all the wickets you have to cross in order to make sure every contractor is 100 percent happy. I read *Purchasing* magazine, which is the civilian world's trade magazine for purchasing. When I think about that magazine and compare it with NCMA's\* [National Contract Management Association], I'm struck by the differences. In Government, we're worried about the rules and making sure we don't do something wrong. In the private sector, they're worried about getting the right product, and teaming with their suppliers....When it comes to [the Rewrite], I guess it is moving us to be more like the commercial side, which I think is positive. [Narrative #14]

**D. MAJOR CHANGES**

In contrast to the previous section, where comments were received on the broad topic of policy intent, this section will focus on the three major issues identified in Chapter V. Since this section will specifically discuss three somewhat narrowly defined areas, it is appropriate to address each topic in turn. In doing so, industry and contracting officer comments will be presented within each of those three segments, allowing a comparison of the two viewpoints that was not possible in the preceding section.

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\* NCMA publishes *Contract Management*, a magazine dedicated to Government contracting issues.

## **1. Setting the competitive range**

### **a) *Industry***

Industry participants were generally positive about setting a narrower competitive range, reasoning that this will save them money and time. One of the interviewees had the following comment:

The sooner I know I'm not competitive, the sooner I can move on. Why would I want to waste the time and B & P if I don't have a good chance to win? For us, our proposal costs are significant, and if we can cut back our costs there, it makes our business [that much more viable]....Also, it saves the Government money because [the procurement process] should move more quickly. When an award takes a long time, we have to constantly update our proposal [to reflect changed costs and prices]. If the Government can shorten the time between original proposal and award, it's going to save them money. [Narrative #6]

Another interviewee echoed the need for a more realistic competitive range, but was somewhat guarded about the Government's adoption of the changes:

I think the changes are good [setting a tighter competitive range], but I'm anxious to see how it all plays out. If the contracting officer uses the new rules and doesn't fall into the trap of leaving everyone in the competitive range just to have more options, then the changes will be good. If [the contracting officer] conducts business as usual, then there is little benefit...Implementation is the key to success. [Narrative #3]

### **b) *Contracting officers***

The Government participants were also receptive to the new rules, and talked about the old standard of "when in doubt, keep them in" and the problems it created. One of the interviewees made the following comment concerning this issue:

In the past, you had to keep in firms that really had no chance of getting an award just to meet the number. You were making those firms expend money to continue when they really didn't have a realistic chance of

getting an award....[That said], you have to retain a sufficient number in the competitive range to ensure that you will have competitive pricing. Again, the number depends on the number of offers you received initially and what the problems are with those offers. The new rule lets you base the number in the competitive range on the proposals, not the fear of protest. [Narrative #9]

Finally, one interviewee discussed how it benefits his agency to have effective competition, but that everyone loses when it is artificially created. Here, the contracting officer also talked about the issue of mandating a minimum number for establishing the competitive range:

I don't think a "forced" competitive range is in anyone's best interest, especially the contractors. If an offeror in reality has no chance of receiving an award, why string them along and make them incur the cost of continuing to pursue the award? They are better off using company resources in trying to get an award they have a realistic chance of winning. I prefer to have at least two in the competitive range to have true competition, but I have had cases where only one offeror had a technical proposal which was anywhere close to what we required....If the regulations have to establish a minimum number to protect the integrity of the system, then that would tell me that PCOs are either not intelligent enough to use proper judgment, or not honest enough to do so. [Narrative #15]

## **2. Reducing for efficiency**

### **a) *Industry***

The majority of industry representatives were somewhat unfamiliar with the arguments underlying this issue, which they largely attributed to a lack of exposure to the new rules. None had experienced a reduction in the competitive range due to efficiency, what with the FAR Part 15 Rewrite only recently becoming mandatory in Federal procurements. One participant, however, did make the following observation:

To me, it's revealing that there is even a debate about whether to do something more efficiently! Why wouldn't you want to do it if it's more efficient? As long as everyone gets the same initial shot [at evaluation for competitive range], then I don't see a problem....That's the way it's supposed to work. When you buy from someone, don't you boil it down to just a few at some point? When I buy a car, I research the best price, but I don't go across country when it's time to haggle over the price. Any savings I might get are going to be eliminated from having to deal with a thousand dealers. [Narrative #1]

*b) Contracting officers*

In contrast, Government interviewees seemed well-versed in this change, and offered a number of comments concerning efficiency and its impact on the competitive range. When asked whether a definition of "efficiency" is needed, one of the research participants offered the following comment:

We do not need a definition of efficiency. First, it would constrain us as to what is "efficient," and I'm not sure that a bureaucracy can define efficient. Second, by defining efficiency, we limit ourselves to what we can do in order to be efficient. It is like writing a contract that defines everything to the n<sup>th</sup> degree. If an unforeseen situation arises, you have no room to maneuver. Also, it takes the thinking out of the process. [Narrative #10]

This concern about a regulatory definition of "efficiency," and the increased chance for protest, was seconded by another contracting officer, who said:

No, I don't think the FAR needs to define efficiency. I think if we included a definition of efficiency, it would just be one more item subject to protest....Why set a boundary on what is or isn't efficiency? Every procurement is different, and using a set definition seems like a failure to recognize this fact. It is up to the contracting officer to exercise good judgment, and to look at the facts of the particular situation. [Narrative #8]

Finally, an interviewee discussed what "efficiency" means in practical terms, providing an example of how it is likely to be used in actual application:

"Efficient" doesn't need to be defined, because the actual responses to the solicitation will drive what is "efficient." Any time you put definitions into the FAR, you loose the inherent flexibility that is there. By defining "efficient," you take away the discretion that [the FAR Part 15 Rewrite] added, and I feel that it is unnecessary....If you get three offers and want to delete one, it probably doesn't improve efficiency. But when you get 20 offerors and want to get it down to three or four, you will definitely be improving "efficiency." The type of commodity drives how many offers you get; IT [information technology] and non-technical support services usually get so many offers that you really do need to be able to trim the competitive range. [Narrative #11]

The research participants were also asked whether there should be a minimum number of offerors in the post-efficiency competitive range. One of the interviewees offered the following observation, adding that there is an unspoken minimum that they would strive for:

I really don't like the idea of setting a minimum or maximum number on the firms to keep in the competitive range. However, I would suggest that as a rule of thumb—not set in concrete—you would want between three and six firms depending again on the responses that you have to the solicitation. [Narrative #9]

Another contracting officer, who primarily conducts large dollar acquisitions, was reluctant to establish any type of minimum, arguing that it is entirely dependent on the situation:

No, it should be based on good business judgment. If you said that two would have to be retained and only one was clearly capable, then what? Aren't you wasting his time and yours?....You can't go into a procurement with a preconceived number for the competitive range. There is no right answer or number when setting the competitive range; it's situational dependent. [Narrative #12]

### **3. Communications**

#### *a) Industry*

Here again, the industry research participants were receptive to the new changes, but cautiously optimistic about their implementation. They welcomed increased dialogue and the flow of information, and saw few problems with the increased flexibility. One interviewee provided the following observation:

One of the biggest problems I have with Government contracts is an inability to have effective communications. It's hard to speak with anyone about your proposal. For me, the solicitations generate more questions than they answer. If communications means the Government telling me exactly what they want, and giving me the opportunity to clear up questions, then it will be a big plus. It's a normal business practice to talk to the people you deal with, and this is one of the areas where the Government definitely hurts itself. [Narrative #7]

Although most of the industry participants were positive about the changes to expanded exchanges, one interviewee was decidedly less enthusiastic about this rule change, and saw it as a continued expansion of the contracting officer's discretion:

They [the contracting officer] already have too much power to award contracts. This is only going to increase the problem of contracting officers giving awards to who they want, irrespective of the other proposals. I mean, negotiated procurements are already subjective, so why do they need more discretion?....I think one organization should write the solicitation, but another one should do the evaluation. Right now, the large, connected contractors are writing the specs, and so the award is essentially made before the solicitation is ever issued. All this is going to do is worsen the situation. [Narrative #4]

**b) Contracting officers**

Contracting officers viewed the addition of communications as an improvement to their ability to determine a competitive range. One interviewee offered the following comment regarding this new rule:

[Communications] will permit the contracting officer to get the additional information necessary to make an informed, rational decision as to which offerors should be retained in the competitive range. What's the alternative? Blindly going forward and putting an unqualified offeror in the competitive range over a better proposal? That's much less fair than making a sound decision after having cleared up any problems. I don't see any downsides to this change. [Narrative #11]

Another participant also echoed support for the new flexibility, but raised the issue of excessive communications and technical leveling:

This [communications] will be much more useful than the old system. Now, you can confidently set the competitive range, because you can resolve questions about offerors that are "on the bubble." Instead of having to include them all in discussions, you can save all that cost and time by clearing it up in communications....Communications allow you to assess capability much more evenly, but without leveling. I know during extensive discussions, that technical leveling can sometimes result, even though that was clearly not the intent. With communications, I know that's an issue, so it's something we're going to have to be cautious about. [Narrative #10]

Finally, contracting officers were asked about using "communications" in conjunction with—or in place of—the ability to reduce the competitive range for efficiency. One of the interviewees summed up the general view when he made the following comment:

I don't think "communications" will hamper our ability to reduce the competitive range for efficiency; it just makes sure we have the correct companies in the competitive range....Communications are

exchanges prior to the establishment of the competitive range, which provides a bit more latitude regarding what may be discussed at that point in time....We used to be able only to address minor clarifications; while now it is a bit broader, it still doesn't allow anything close to what would be a proposal revision. If we decide for a particular procurement that three offerors constitute an efficient procurement, then that would be true with or without communications. Communications allow us to better determine which three offerors that will be—without allowing proposal revisions. It just makes sense to use the two together. [Narrative #8]

#### **E. ANALYSIS OF OPINION RESEARCH**

The opinion research included interviews with a wide range of people tasked with implementing and using the new rules on source selection. Although there were sometimes disparate views regarding the new policy, there were a number of trends and patterns that evolved from this portion of the research.

Both Government and industry strongly support any attempt to reinvent acquisition and adopt more commercial-like practices. Needless to say, on a macro-level, it is hard to develop a convincing argument against process improvement and greater efficiency. Similarly, both parties also understand the driving forces behind many of the changes: a shrinking industrial base, limited procurement funds, reduced Government infrastructure, and a need for shortened cycle time.

In fact, none of the interviewees endeavored to explain why the overall intent of the FAR Part 15 Rewrite is poor policy, in and of itself. Rather, the dissenting voices—primarily industry participants—focused on the implementation of the policy, and what they feared could be inconsistent treatment of the rules. A collation of the varied interviews reveals that there are a few specific areas of concern: (1) that the contracting

officers might abuse the increased discretion, (2) that expanded communications could result in unfair practices, and (3) that contracting officers might continue to avoid risk by leaving companies in the competitive range for the sake of appearances. Interestingly, this last concern ties in with the industry interviewees' most often-mentioned benefit: the new rule will save B & P costs.

As expected, contracting officers were overwhelmingly supportive of the new rules. In terms of the specific effect of the changes, the Government interviewees identified a number of positive benefits: (1) increased discretion will allow more flexibility and responsiveness in fulfilling users' needs, (2) the cost and cycle time involved with a procurement should shrink, and (3) protests or the likelihood of protests are likely to drop. Notably, the majority of the Government participants seem to have an unwritten minimum in terms of the number of offerors they intend to leave in the competitive range after reducing for efficiency. Although certainly dependent on the complexity and other features of a particular procurement, it appears that most will strive to have at least three in the competitive range.

Finally, the interviews conducted with the Government participants revealed that some of the contracting officers intend to take a somewhat cautious approach to the new rules. Here, the reasoning appears to be that there are changes that are sure to be tested, and it is better to err on the side of conservatism than participate in new case law. That said, those same contracting officers intend to use the rules as they are written, but are very conscious of the boundaries. Rather than interpret or read into the regulations

unstated intent, they anticipate carefully applying the new rules until the "gray" areas more fully evolve. Not surprisingly, this is consistent with the generally risk-averse nature of Federal contracting and displays a cultural bias that is evident in many public sector organizations.

#### **F. SUMMARY**

This chapter provided industry and contracting officer insight as to the intent and impact of the FAR Part 15 Rewrite with regard to competition. In this section of the study, the actual users of the new policy gave their opinion of the problems and benefits they expect to encounter. Their observations should serve as an excellent gauge or measure of the significant issues and problems that are certain to ensue. Undoubtedly, the reengineering of a system and its rules—developed over many years—will result in a certain number of growing pains in the ensuing implementation and application.

The next chapter will provide the conclusions and recommendations from this study. In addition, the advantages and disadvantages of the new rules will be discussed. Finally, the study will provide ways to mitigate those disadvantages and problems that are likely to result. This will afford contracting officers the information and suggestions they will need to facilitate the changed rules on negotiated source selection.



## **VII. CONCLUSIONS AND RECOMMENDATIONS**

### **A. INTRODUCTION**

The objectives of this research were to assess the intent of the FAR Part 15 Rewrite regarding competition, and to provide an analysis into the major issues and problems associated with the new rule. In doing so, the study established the legislative intent of the existing benchmark for competition—CICA's full and open mandate—in negotiated source selection. The study then provided an analysis of the significant external and internal forces that have stimulated change in the Federal acquisition system, particularly as they affect contracting by competitive negotiation. Here, the underlying themes and principles that are manifested in the new FAR Part 15 were developed and presented. Finally, the research identified and examined the three major changes that have the greatest impact on competition in negotiated source selection: determining the competitive range, reducing it for efficiency, and using communications to set the competitive range. In evaluating these three major changes, the study also established the supporting arguments and reasoning behind the various conflicting positions held by critics and supporters. To that end, an inductive analysis of the archival and opinion research was conducted, which isolated the remaining issues related to competition in the FAR Part 15 Rewrite.

In this chapter, the conclusions and recommendations that were drawn from the analysis of the research will be presented. Here, the study will provide contracting

officers and agencies definitive statements concerning the new rules and their impact on competition in the source selection process. In conjunction, the researcher will propose actions that officials and organizations involved with negotiated procurement should take to facilitate implementation of the changed rules.

## **B. CONCLUSIONS**

### **1. The FAR Part 15 Rewrite is not in conflict with CICA's mandate for full and open competition.**

Although many critics argue that the FAR Part 15 Rewrite adversely affects the CICA requirement for full and open competition, the new rule does not alter the mandate for open access to the Federal procurement process. Certainly, much of the debate in this area can be traced to the initial proposals and discussions concerning changes to negotiated source selection. Although there were early attempts to modify the existing standard—both in the administration's FAIA proposal leading up to FARA and early versions of the Rewrite—the final rule left the original Congressional intent of full and open competition unchanged. Here, every contractor who desires to submit a proposal is assured that its proposal will be evaluated against the solicitation criteria prior to making any competitive range determination.

### **2. The pre-Rewrite procurement system for negotiated contracting does not support mission needs.**

The changed environment within which the Government, particularly DoD, operates has necessitated a corresponding change in the methods for conducting

procurement. The end of the Cold War, persistent budget deficits, a shrinking defense industrial base, and modern warfare that emphasizes advanced technology have all combined to force a reinvention of Federal procurement. Prior to the changes made by the FAR Part 15 Rewrite, the substantial defense budgets and slower technological change allowed for inefficient contracting processes. Now, the mission demands reduced procurement cycle time and lowered costs, neither of which are possible in the pre-Rewrite system of overly prescriptive rules and processes.

**3. The FAR Part 15 Rewrite reengineers negotiated contracting.**

The new rules dramatically change the manner in which contracting officers conduct negotiated source selection, particularly in terms of expanding discretion and flexibility for contracting officers. Although the revised FAR Part 15 does not fully realize the original intent of acquisition reformers to move from rigid rules to guiding principles, it does substantially reduce the directive and controlling manner under which the previous rule governed competitive negotiations. The new rule successfully achieves a subtle shift away from detailed and time-consuming processes, and moves to a system that will allow agencies to more quickly and efficiently meet their needs.

**4. Competition will not suffer as a result of the FAR Part 15 Rewrite.**

Critics of the changes assert that the new rule will diminish competition, and lead to a smaller pool of contractors and higher procurement costs. In fact, there is no indication that the changes made by the FAR Part 15 Rewrite will adversely affect competition. Rather, the data suggest that the less bureaucratic and cumbersome rules

will actually expand the industrial base, encouraging more companies to compete for Government contracts. Since every offeror is still assured of having its proposal evaluated strictly in accordance with the solicitation, but will now save limited B & P resources by finding out earlier in the process when they are not competitive, there is no reason to predict a reduction in competition.

**5. The changed standard for determining the competitive range is a key tool for managing negotiated source selection.**

The most dramatic shift in the ability of the contracting officer to conduct a negotiated procurement quickly and efficiently can be traced to the new standard for determining the competitive range: "when in doubt, leave them out." This new criterion will be the single-most valuable tool in achieving the goals of the FAR Part 15 Rewrite. It gives contracting officers the regulatory support they need to minimize procurement costs, both in time and money. Contracting officers were previously reluctant to exclude offerors from the competitive range for fear of protest, but the new standard aligns the competitive range decision with the realities of the ultimate award decision. In light of the fact that award to other than one of the top three proposals is unlikely, this change mirrors the facts of the current environment.

**6. The ability to reduce the competitive range further for efficiency will shorten cycle time and lower costs.**

Although critics argue that the Government's emphasis on efficiency connotes a zero-sum tradeoff that reduces fairness, in reality the application of efficiency will not

result in a lessening of true competition. Contracting officers do not anticipate reducing the competitive range below the level at which effective competition will occur, but rather will use the tool selectively to meet shorter cycle times and conserve costs associated with discussions and actual award. Finally, contracting officers are quick to point out that a reduction in the competitive range for efficiency is procurement-specific, and is not a methodical means of managing the competitive range decision.

**7. Efficiency will not supplant fairness in Government negotiated contracting.**

The FAR Part 15 Rewrite strives to make the Federal acquisition system more commercial-like, but the rules and their implementation do not elevate efficiency above fairness. Simply put, it is a well-established and accepted tenet of public contracting that all parties be given equal access to Government contracts, and this doctrine is unchanged by the new rules. Every offeror is still invited to submit proposals for evaluation, but the Government has now stated that it intends to conduct its procurements more efficiently. The new rule, although it does vest greater discretion in the contracting officer, continues to provide specific and clear emphasis concerning the requirement for fair treatment of all offerors.

**8. Expanded exchanges through communications will improve the source selection process.**

"Communications" are designed to reduce barriers to the flow of information. Certainly a core function of everyday private sector contracting, commercial firms

consider expanded communications and information sharing as fundamental to the acquisition of quality goods and services. Here, the Government has given contracting officers the same needed flexibility, providing them a tool to make more informed competitive range decisions. This added ability to make a fair and well-reasoned decision concerning those offerors whose inclusion in the competitive range is uncertain, will, in fact, increase contractor's perception of fairness and even treatment by the Government.

**9. Small businesses will not be disadvantaged by the new rules.**

Although small business interests offered much of the criticism of the new rules, there is no evidence that they will be disadvantaged under the changed procedures. Rather, the FAR Part 15 Rewrite is likely to benefit them as much as it does any other company. Since the new rule removes the incentive for contracting officers to leave offerors in the competitive range even though they are unlikely to win the award, the Rewrite saves contractors—small and large—significant resources, both in time and money. Under the new policy, an offeror will not be retained in the competitive range unless it is one of the most highly rated, and the result will be substantial savings in B & P costs. These B & P costs can then be redeployed to other, more promising proposals. The net effect is to increase, not decrease, the number of opportunities a small business has to win a contract award.

**10. The FAR Part 15 Rewrite provides significant increases in contracting officer flexibility and discretion.**

Finally, the new policy achieves one of the fundamental purposes of acquisition reform: boost contracting officer discretion and flexibility. This increased discretion is an intrinsic feature of the Rewrite and serves to provide contracting officers the regulatory authority they need to realize the increased procurement savings and reduced cycle time that are expected. Citing commercial best-practices and widely accepted business management theories, acquisition reformers have succeeded in infusing greater discretion into the acquisition process.

**C. RECOMMENDATIONS**

**1. Agencies must continue to emphasize and reinforce the importance of effective competition.**

One of the goals of this study was to determine the intent of policymakers, both legislative and executive, in rewriting the FAR Part 15. Undoubtedly, the retention of full and open competition is a clear mandate for the Federal procurement system. Competition is a pulse point or benchmark for many outside observers of Government procurement, and as the researcher showed in Chapter II, often misunderstood and distorted. As such, any implementation of the Rewrite that fails to maintain a distinct and evident emphasis on competition—or even the perception of absolute competition—will surely result in calls for increased Congressional specificity regarding competitive negotiation procedures. In order to maintain the momentum of acquisition reform,

particularly concerning issues of greater contracting officer discretion, agencies must vigilantly ensure that their competitive procurement practices are unassailable by potential critics. This study has shown that many issues remain concerning the ultimate impact of the FAR Part 15 Rewrite, and agencies must be cognizant of this fact. If agencies fail to fulfill the Congressional intent for full and open competition, this will only bolster arguments for a return to tighter controls and rules on contracting officers.

**2. Contracting officers must be conscious of the need for increased judgment and sound reasoning under the new rules.**

The new rules dramatically alter the environment within which contracting officers operate. In the past, the procurement process was governed by a series of somewhat methodical and procedural steps. Although safe and predictable, it was also much less adaptive to the needs and characteristics of a particular acquisition. Now, the FAR Part 15 Rewrite has placed a premium on the ability of contracting officers to apply increased judgment and reasoning to a variety of situational-specific procurements. Here, unless contracting officers use these enhanced features to leverage increasingly constrained agency resources, the Federal procurement system—especially DoD—will not realize the procurement savings that are the fundamental goal of this new policy. Contracting officers must readily embrace these new responsibilities, which are backed by hard-fought gains in statutory and regulatory authority.

**3. Agencies must encourage risk management instead of risk avoidance in implementing the FAR Part 15 Rewrite.**

Agencies also have a key role in assimilating the FAR Part 15 Rewrite. Without a cultural change in attitudes regarding risk, any enthusiasm and willingness on the part of contracting officers to fulfill the promise of the new policy will quickly erode. Here, leadership—at the highest level of the Federal procurement system—must strive to change a culture that has typically avoided risk instead of accepting and managing it. Inevitably, there will be cases where contracting officers will misapply the rules, which is to be expected from an entity with total contracts valued in the hundreds of billions of dollars. Leadership must recognize that this will happen, but have the foresight to address the individual problem, not condemn the entire system. Rather than a reactionary approach that would re-design the system for every worst-case scenario, leadership must simply hold responsible those who exhibit poor judgment. Notably, this is the other side of the coin with regard to greater flexibility and discretion: contracting officers have a corresponding increase in responsibility and accountability for their actions. This, again, demands a cultural change in perception concerning the role and function of Federal procurement professionals.

**4. The contracting officer should strive to award without discussion if the solicitation permits.**

The FAR Part 15 Rewrite was designed to shorten the time and costs involved with making a procurement. One of the tools that is highlighted in achieving these goals

is the emphasis on award without discussion. Contracting officers should award without discussion if possible, versus unnecessarily establishing a competitive range and conducting discussions. This recommendation is made for a couple of reasons. First, conducting discussions is expensive for both the offerors and the agency. When there is a need to determine whether the award should be made with or without discussions, the contracting officer should consciously base their decision on an evaluation of the costs involved with each approach. If the cost to determine a competitive range and hold discussions is more than the expected savings in contract price, then the award should be made without holding discussions. Second, the increased use of award without discussions will bolster other aspects of the FAR Part 15 Rewrite. One of the criticisms of the new rule is that it reduces the ability of offerors to dramatically revise their proposals during the course of discussions. Where in the past an offeror was often motivated to simply get into the competitive range so that they could subsequently "make their proposal right" during discussions, the Rewrite wants to force the initial offer to be competitive. By awarding without discussions when possible and establishing that this is the preferred outcome, contracting officers will gradually change offerors' attitudes about the need for competitive initial offers. This will result in increasingly better proposals—ones that will greatly reduce the need for costly and time-consuming competitive range determinations and subsequent discussions.

**5. Contracting officers must ensure communications are clearly within the regulatory bounds established by the FAR Part 15 Rewrite.**

Although this statement seems obvious, it is prompted by the fact that communications are a new concept in contracting by negotiation. Since this is an untested tool for use in setting the competitive range, it is certain to be clarified further through protests and the resultant case law. Although contracting officers should use this increased flexibility to its fullest potential—communications are a fundamental feature of the new rules and of the goals the Rewrite strives to achieve—they must be well aware of the restrictions on its use. Rather than stretch the bounds set forth in the FAR Part 15, they must ensure that communications do not provoke charges of unfair practices, such as favoritism or premature discussions. Notably, GAO comments in this area were instrumental in shaping the final rule, which points again to the need to remain solidly within the published framework. Finally, as with other Rewrite features that emphasize greater contracting officer discretion, abuses of this expanded discretion will likely provide critics needed fodder for reversing many of the gains made by the new rules. If contracting officers dramatically fail to use this newfound flexibility judiciously, detractors will quickly argue for a return to prescriptive and detailed negotiated contracting procedures.

**6. Contracting officers should set aggressive competitive ranges.**

Much like the admonition to award without discussion where possible, contracting officers should also strive to set aggressive competitive ranges. Since the research has

shown that offerors who are evaluated as being outside the top three are very rarely awarded the contract, contracting officers should make a reasoned business judgment concerning the cost and increased time that will result from adding additional offerors to the competitive range. The FAR Part 15 Rewrite has directed that the competitive range should include all of the most highly rated proposals, unless further reduced for efficiency, which is a dramatic change from "all of those with a reasonable chance." Furthermore, the research shows that contractors want to know if they are unlikely to win the award, so that they can target their B & P resources to more promising solicitations. Finally, for the same reason award without discussion is recommended, aggressive competitive ranges will also serve to change the perception that initial proposals are simply an entrance ticket into the competitive range. This will also serve to encourage increasingly competitive initial proposals, resulting in a more accurate and fair competitive range determination.

**7. Contracting officers must strictly follow the solicitation in evaluating proposals for inclusion in the competitive range.**

This last recommendation strips away the smaller and more specific suggestions, and simply exhorts contracting officers to adhere to the solicitation—the solicitation which offerors have relied on to guide in preparation of their proposals—in evaluating the offers. Although an obvious and fundamental statement, failure to follow the solicitation strictly when evaluating offerors is the surest way to a protest. Here, the FAR Part 15 Rewrite has changed the environment within which contracting by negotiation is

conducted, creating a need for greater trust and reliance on the contracting officer. If a contracting officer fails to follow even this simple and unquestioned step, there is little chance of building critics' faith in the ability of the contracting officer to fairly wield greater discretionary authority. Certainly, this strikes to the core of competition and setting a fair competitive range.

#### **D. ANSWERS TO RESEARCH QUESTIONS**

##### **1. Primary**

**What is the intent of policymakers in implementing the FAR Part 15 Rewrite, and what is industry's viewpoint of the policy and its impact on competition when contracting with the Government?**

Although the legislative and executive branches both agreed on the need to save procurement costs through greater efficiency, the manner in which each was willing to accomplish this goal was somewhat varied. Where administration policymakers wanted to move the current procurement system to one that closely resembles that of the commercial sector, Congress focused on the impact on full and open competition and fairness. In the end, the "radical" reforms that were held up as commercial best practices gave way to more modest and politically acceptable changes. As such, the final intent of the FAR Part 15 Rewrite is to shorten cycle time and reduce costs through more flexible and adaptable contracting processes, while maintaining the Congressional mandate for open access to the Federal procurement process.

In terms of industry's viewpoint of the policy, there is a vocal minority that doubts the FAR Part 15 Rewrite will be an improvement to the existing system. This group feels that the increased discretion and reduced controls in the new procedures will result in favoritism, unfair treatment, and even the funneling of contracts. In support of their argument against the new policy, these detractors state that the FAR Part 15 Rewrite will reverse many of the gains made by Congress in passing CICA, and will lower competition as a result. On the other hand, the overwhelming majority of contractors feel the new policy tremendously improves a Federal procurement system they feel is bureaucratic, slow, procedurally constrained, and inefficient. They welcome any reform that strives to inject sound business practices into the way contracting officers conduct negotiated procurements, because they see themselves benefiting from more honest and early feedback concerning their chances for award. This group, therefore, feels the FAR Part 15 Rewrite will result in greater competition for two reasons: (1) individual firms will be able to save B & P costs so that they can bid on more solicitations, and (2) commercial firms that have not typically pursued Government contracts will be encouraged to do so as the differences between Federal and private contracting become increasingly smaller.

## **2. Subsidiary**

### **(a) What were the policies and influential factors that guided formulation of the new rules?**

Chapter II discussed the development of the legislation and regulations that serve as the foundation of the Federal procurement system. Here, the study established CICA as the manifestation of a Congressional desire to boost competition in Government contracts. As such, CICA has remained the backdrop against which subsequent procurement legislation has been tested, with the FAR Part 15 Rewrite being no different.

In Chapter III, this research used CICA as a transitional point, and showed how persistent Federal budget deficits, the Cold War, and the break-up of the Soviet Union created new challenges, culminating in calls for greater efficiency in Government. Similarly, a reduction in defense spending led to dramatic contractions in the industrial base, which only intensified the inability of DoD to acquire state-of-the-art technology from many U.S. high tech firms. During this same timeframe, management theorists were also calling for a greater emphasis on quality and business reengineering, two themes that have continued into the 1990s. In conjunction, commercial firms responded to the globalization of commerce and markets by adopting a number of best practices—practices which acquisition reformers have tried to emulate.

Lastly, Chapter IV discussed the numerous acquisition reform efforts that have attempted to transform the varied ideas and practices into a workable system for Federal procurement. Increasingly, the emphasis focused on efficiency and changes that would

better serve the customer, be it the taxpayers or military end-users. Here, the NPR was particularly influential, as it set forth as an explicit goal the need to achieve greater efficiency in Government. Notably, many of the recent and ongoing acquisition reform efforts can be traced to the NPR, which has been supported at the highest levels of the Clinton administration. Just as the NPR provided the broad goal and aim of increasing procurement efficiency, the Procurement PAT provided a number of specific and comprehensive recommendations that were very influential in helping shape the FAR Part 15 Rewrite. Finally, FARA and the legislative debate that was involved with its passage were undeniably influential as the key legislation underlying the new policy. Although many would point to FARA as the cause-and-effect of the FAR Part 15 Rewrite, this is only partly true, as FARA is simply the culmination of the many influences that were just discussed.

**(b) What are the major changes to the FAR Part 15 with regard to competition?**

There were three major changes to the FAR Part 15 concerning competition: determining the competitive range, reducing the competitive range for efficiency, and conducting communications.

The most significant and powerful tool of the three is the changed standard for determining the competitive range. Where in the past contracting officers were reluctant to exclude offerors from the competitive range due to the "reasonable chance" standard, now contracting officers must only retain those most highly rated, unless they further

reduce the competitive range for efficiency. This will dramatically improve the ability of the contracting officer to shorten the procurement time and save costs associated with extensive and multiple discussions.

Reducing the competitive range for efficiency is another major change to the FAR Part 15, but it has a less significant effect on the contracting process than the other two changes. Although the Government's push for "efficiency" in the Rewrite was often the focus of attack by critics, in reality this change will play a secondary role to the changed competitive range standard and to the new concept of communications. That said, reducing the competitive range for efficiency does allow the contracting officer to further shorten cycle time and lessen procurement costs. Furthermore, it also signals an emphasis on efficiency and the acceptance of tradeoffs regarding costs and risk, an important step in effecting a cultural change toward risk management.

Communications is the third major change, and will provide the contracting officer a powerful means to narrow the competitive range. Where before the contracting officer was limited to minor clarifications and discussions, "communications" was added to allow a more accurate and informed decision concerning which offerors will or will not be in the competitive range. This flexibility to achieve more dynamic and open exchanges goes hand-in-hand with the new standard for setting the competitive range: all of the most highly rated proposals. Without this added way to communicate with offerors, the move away from the "all those with a reasonable chance" standard would have been unfair and prone to error. Now, the contracting officer can set a smaller and

more realistic competitive range, confident in the fact that communications allowed resolution of those offerors whose inclusion in the competitive range was uncertain.

**(c) What are the key issues and projected problems created by the FAR**

**Part 15 Rewrite with regard to competition?**

Chapters V and VI discussed the key issues that are either unanswered or created—according to detractors—by the new policy. In terms of the three major changes that affect competition, there are a variety of concerns associated with each. Regarding the new competitive range standard, critics cite excessive discretion, diminished competition, inability to substantially revise proposals, and the negative impact on small businesses as problems with the new policy. Similarly, if the contracting officer exercises the ability to further reduce the competitive range for purposes of efficiency, detractors fear that efficiency is not defined and will be inconsistently applied, that there is not a regulatory minimum that will prevent contracting officers from excessively limiting the competitive range, and that fairness will suffer. Finally, the critics argue that the new concept of communications will result in excessive discretion and unfair treatment, creating a system where contracting officers could favor one offeror over another through more extensive communications.

**(d) What are the advantages and disadvantages—under the new rules—for a contracting officer in managing competition in the source selection process, and how can the disadvantages be mitigated?**

The advantages of the new policy are significant. One, it allows the contracting officer much greater discretion and flexibility in conducting a negotiated procurement. Unanimously, contracting officers cited this loosening of bureaucratic controls as the single-most important step in allowing them to conduct a procurement more quickly and efficiently. Now, they will be better able to support the mission needs of the user. Two, it provides the regulatory support that a contracting officer needs to adopt and employ sound and reasoned business practices. Instead of having a large competitive range made up of offerors with little chance of award, a contracting officer will be able to provide honest and early feedback concerning actual chance of award. This will save both the Government and the contractors money and time. Three, the reduction in prescriptive and detailed guidance concerning the conduct of a negotiated procurement will lessen the chance of protest. Rather than be driven by a fear of protest due to a procedural mistake, the contracting officer will be able to focus more on the business aspects of the procurement: communicating problems, reducing the number of offerors that require discussions and their associated costs, and holding higher quality discussions with a smaller competitive range. Finally, the FAR Part 15 Rewrite will help the contracting officer attain increased competition by boosting the number of contractors who will submit offers. This will occur for two reasons: (1) the new policy lowers many of the

barriers that commercial firms cite as obstacles to contracting with the Government, and (2) it increases offeror's cash flow—via B & P costs—through earlier feedback regarding competitiveness for award. Here, the changes will drive down prices and expand the industrial base, simplifying the contracting officer's challenge to obtain a low price and maximum competition.

That said, there are also disadvantages to the new policy. Increased discretion brings with it an increased demand for sound and reasoned judgment. Where in the past a contracting officer could comfortably rely on the safety net of detailed and methodical procedures, the FAR Part 15 Rewrite places a premium on the judgment and business acumen of the contracting officer. Realizing the concerns of industry regarding the new policy's impact on fairness, the contracting officer must, even more so than in the past, ensure that there is no basis for charges of favoritism. The contracting officer must also be ready to defend decisions that are made in the "grey" areas of the new policy, particularly those that have been cited as projected problems. Issues such as the definition and application of efficiency have largely been left up to the contracting officer's discretion, and the contracting officer should be able to provide a well-reasoned and rational basis for its application. Similarly, communications is a new and untested concept, and a contracting officer must be conscious of the regulatory limits that were largely shaped by GAO input.

## **E. AREAS FOR FURTHER RESEARCH**

In view of the fact that the FAR Part 15 Rewrite only became mandatory this year, there is insufficient data to assess its true impact on negotiated contracting. After contracting officers and contractors have gained greater exposure to the new policy in terms of actual implementation and use, more definitive information regarding its affect on the procurement process will be possible. As such, future research is warranted in the following areas:

1. Analyze the affect on competition—as measured by acquisition metrics—of the new policy, and contrast it with the pre-Rewrite system for conducting negotiated procurements. Has competition, in fact, increased as a result of the new policy?
2. Determine whether the FAR Part 15 Rewrite has resulted in a reduction in the number of protests associated with competitively negotiated source selection. Have the broadened powers of the contracting officer and the simplified processes reduced the incidence of protest? How has GAO interpreted contracting officers' applications of efficiency and communication?
3. Conduct an analysis of the policy no earlier than the year 2001, and determine if the goals of the Rewrite were achieved through adoption of the changed procedures. Specifically, evaluate the effect on cycle time and reduced procurement management costs.
4. Determine what affect the FAR Part 15 Rewrite has had on contractors' cash flow and B & P resources. Evaluate whether contracting officers have fulfilled the

promise of the new policy by establishing more realistic competitive ranges—indicating risk management—or have continued to include a large number of offerors. Has increased contracting officer discretion translated into lower contractor costs?

## LIST OF ACRONYMS

ABA	American Bar Association
ASPA	Armed Services Procurement Act
ATF	Acquisition Task Force
B&P	Bid and Proposal
BAFO	Best and Final Offer
CICA	Competition in Contracting Act
COGP	Commission on Government Procurement
Comp.Gen.	Comptroller General
DCMC	Defense Contract Management Command
DMR	Defense Management Review
DoD	Department of Defense
DOE	Department of Energy
DOT	Department of Treasury
FAIA	Federal Acquisition Improvement Act
FAR	Federal Acquisition Regulation
FARA	Federal Acquisition Reform Act
FASA	Federal Acquisition Streamlining Act
FCR	Federal Contracts Report
FCR	Federal Contracts Report
FPASA	Federal Property and Administrative Services Act
GAO	General Accounting Office
GDP	Gross Domestic Product
GSA	General Services Administration
HR	House Resolution
IT	Information Technology

ITMRA	Information Technology Management Reform Act
MSPB	Merit Systems Protection Board
NASA	National Aeronautics and Space Administration
NPR	National Performance Review
OFPP	Office of Federal Procurement Policy
OIRA	Office of Information and Regulatory Affairs
PAT	Process Action Team
PL	Public Law
R&D	Research and Development
Reps.	Representatives
S	Senate
TINA	Truth in Negotiations Act
TQM	Total Quality Management
U.S.C.	United States Code
UFPS	Uniform Federal Procurement System

## APPENDIX

The following is Division D of the National Defense Authorization Act for Fiscal Year 1996, which was signed by President Clinton on February 10, 1996:

### **DIVISION D—FEDERAL ACQUISITION REFORM**

#### **SEC. 4001. SHORT TITLE.**

This division may be cited as the 'Federal Acquisition Reform Act of 1996'.

#### **TITLE XLI—COMPETITION**

##### **SEC. 4101. EFFICIENT COMPETITION.**

(a) ARMED SERVICES ACQUISITIONS- Section 2304 of title 10, United States Code, is amended—

- (1) by redesignating subsection (j) as subsection (k); and
- (2) by inserting after subsection (i) the following new subsection (j):  
'(j) The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements.'
- (b) CIVILIAN AGENCY ACQUISITIONS- Section 303 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253) is amended—
  - (1) by redesignating subsection (h) as subsection (i); and
  - (2) by inserting after subsection (g) the following new subsection (h):  
'(h) The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements.'
  - (c) REVISIONS TO NOTICE THRESHOLDS- Section 18(a)(1)(B) of the Office of Federal Procurement Policy Act (41 U.S.C. 416(a)(1)(B)) is amended—
    - (A) by striking out 'subsection (f)' and all that follows through the end of the subparagraph and inserting in lieu thereof 'subsection (b); and'; and
    - (B) by inserting after 'property or services' the following: 'for a price expected to exceed \$10,000, but not to exceed \$25,000.'

##### **SEC. 4102. EFFICIENT APPROVAL PROCEDURES.**

(a) ARMED SERVICES ACQUISITIONS- Section 2304(f)(1)(B) of title 10, United States Code, is amended—

- (1) in clause (i)—
  - (A) by striking out '\$100,000 (but equal to or less than \$1,000,000)' and inserting in lieu thereof '\$500,000 (but equal to or less than \$10,000,000)'; and
  - (B) by striking out '(ii), (iii), or (iv)' and inserting in lieu thereof '(ii) or (iii)';
- (2) in clause (ii)—
  - (A) by striking out '\$1,000,000 (but equal to or less than \$10,000,000)' and inserting in lieu thereof '\$10,000,000 (but equal to or less than \$50,000,000)'; and
  - (B) by adding 'or' at the end;
  - (3) by striking out clause (iii); and
  - (4) by redesignating clause (iv) as clause (iii).
- (b) CIVILIAN AGENCY ACQUISITIONS- Section 303(f)(1)(B) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(f)(1)(B)) is amended—
  - (1) in clause (i)—
    - (A) by striking out '\$100,000 (but equal to or less than \$1,000,000)' and inserting in lieu thereof '\$500,000 (but equal to or less than \$10,000,000)'; and

(B) by striking out '(ii), (iii), or (iv)'; and inserting in lieu thereof '(ii) or (iii)'; and'

(2) in clause (ii)—

- (A) by striking out '\$1,000,000 (but equal to or less than \$10,000,000)' and inserting in lieu thereof '\$10,000,000 (but equal to or less than \$50,000,000)'; and
- (B) by striking out the semicolon after 'civilian' and inserting in lieu thereof a comma; and
- (3) in clause (iii), by striking out '\$10,000,000' and inserting in lieu thereof '\$50,000,000'.

##### **SEC. 4103. EFFICIENT COMPETITIVE RANGE DETERMINATIONS.**

(a) ARMED SERVICES ACQUISITIONS- Paragraph (4) of 2305(b) of title 10, United States Code, is amended—

- (1) in subparagraph (C), by striking out '(C)', by transferring the text to the end of subparagraph (B), and in that text by striking out 'Subparagraph (B)' and inserting in lieu thereof 'This subparagraph';
- (2) by redesignating subparagraph (B) as subparagraph (C); and
- (3) by inserting before subparagraph (C) (as so redesignated) the following new subparagraph (B):

'(B) If the contracting officer determines that the number of offerors that would otherwise be included in the competitive range under subparagraph (A)(i) exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such criteria.'

(b) CIVILIAN AGENCY ACQUISITIONS- Section 303B(d) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253b(d)) is amended—

- (1) by redesignating paragraph (2) as paragraph (3); and
- (2) by inserting before paragraph (3) (as so redesigned) the following new paragraph (2):

'(2) If the contracting officer determines that the number of offerors that would otherwise be included in the competitive range under paragraph (1)(A) exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such criteria.'

##### **SEC. 4104. PREAWARD DEBRIEFINGS.**

(a) ARMED SERVICES ACQUISITIONS- Section 2305(b) of title 10, United States Code, is amended—

- (1) by striking out subparagraph (F) of paragraph (5);
- (2) by redesignating paragraph (6) as paragraph (9); and
- (3) by inserting after paragraph (5) the following new paragraphs:
  - '(6)(A) When the contracting officer excludes an offeror submitting a competitive proposal from the competitive range (or otherwise excludes such an offeror from further consideration prior to the final source selection decision), the excluded offeror may request in writing, within three days after the date on which the excluded offeror receives notice of its

exclusion, a debriefing prior to award. The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable but may refuse the request for a debriefing if it is not in the best interests of the Government to conduct a debriefing at that time.

(B) The contracting officer is required to debrief an excluded offeror in accordance with paragraph (5) of this section only if that offeror requested and was refused a preaward debriefing under subparagraph (A) of this paragraph.

(C) The debriefing conducted under this subsection shall include—

- (i) the executive agency's evaluation of the significant elements in the offeror's offer;
- (ii) a summary of the rationale for the offeror's exclusion; and
- (iii) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.

(D) The debriefing conducted pursuant to this subsection may not disclose the number or identity of other offerors and shall not disclose information about the content, ranking, or evaluation of other offerors' proposals.

(7) The contracting officer shall include a summary of any debriefing conducted under paragraph (5) or (6) in the contract file.

(8) The Federal Acquisition Regulation shall include a provision encouraging the use of alternative dispute resolution techniques to provide informal, expeditious, and inexpensive procedures for an offeror to consider using before filing a protest, prior to the award of a contract, of the exclusion of the offeror from the competitive range (or otherwise from further consideration) for that contract.

(b) CIVILIAN AGENCY ACQUISITIONS- Section 303B of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253b) is amended—

- (1) by striking out paragraph (6) of subsection (e);
  - (2) by redesignating subsections (f), (g), (h), and (i) as subsections (i), (j), (k), and (l), respectively; and
  - (3) by inserting after subsection (e) the following new subsections:
- (f)(1) When the contracting officer excludes an offeror submitting a competitive proposal from the competitive range (or otherwise excludes such an offeror from further consideration prior to the final source selection decision), the excluded offeror may request in writing, within 3 days after the date on which the excluded offeror receives notice of its exclusion, a debriefing prior to award. The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable but may refuse the request for a debriefing if it is not in the best interests of the Government to conduct a debriefing at that time.

(2) The contracting officer is required to debrief an excluded offeror in accordance with subsection (e) of this section only if that offeror requested and was refused a preaward debriefing under paragraph (1) of this subsection.

(3) The debriefing conducted under this subsection shall include—

- (A) the executive agency's evaluation of the significant elements in the offeror's offer;
- (B) a summary of the rationale for the offeror's exclusion; and
- (C) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.

(4) The debriefing conducted pursuant to this subsection may not disclose the number or identity of other offerors and shall not disclose information about the content, ranking, or evaluation of other offerors' proposals.

(g) The contracting officer shall include a summary of any debriefing conducted under subsection (e) or (f) in the contract file.

(h) The Federal Acquisition Regulation shall include a provision encouraging the use of alternative dispute resolution techniques to provide informal, expeditious, and inexpensive procedures for an offeror to consider using before filing a protest, prior to the award of a contract, of the exclusion of the offeror from the competitive range (or otherwise from further consideration) for that contract.

#### SEC. 4105. DESIGN-BUILD SELECTION PROCEDURES.

(a) ARMED SERVICES ACQUISITIONS- (1) Chapter 137 of title 10, United States Code, is amended by inserting after section 2305 the following new

section:

#### 'Sec. 2305a. Design-build selection procedures

'(a) AUTHORIZATION- Unless the traditional acquisition approach of design-bid-build established under the Brooks Architect-Engineers Act (41 U.S.C. 541 et seq.) is used or another acquisition procedure authorized by law is used, the head of an agency shall use the two-phase selection procedures authorized in this section for entering into a contract for the design and construction of a public building, facility, or work when a determination is made under subsection (b) that the procedures are appropriate for use.

'(b) CRITERIA FOR USE- A contracting officer shall make a determination whether two-phase selection procedures are appropriate for use for entering into a contract for the design and construction of a public building, facility, or work when the contracting officer anticipates that three or more offers will be received for such contract, design work must be performed before an offeror can develop a price or cost proposal for such contract, the offeror will incur a substantial amount of expense in preparing the offer, and the contracting officer has considered information such as the following:

- '(1) The extent to which the project requirements have been adequately defined.
- '(2) The time constraints for delivery of the project.
- '(3) The capability and experience of potential contractors.
- '(4) The suitability of the project for use of the two-phase selection procedures.
- '(5) The capability of the agency to manage the two-phase selection process.
- '(6) Other criteria established by the agency.

'(c) PROCEDURES DESCRIBED- Two-phase selection procedures consist of the following:

'(1) The agency develops, either in-house or by contract, a scope of work statement for inclusion in the solicitation that defines the project and provides prospective offerors with sufficient information regarding the Government's requirements (which may include criteria and preliminary design, budget parameters, and schedule or delivery requirements) to enable the offerors to submit proposals which meet the Government's needs. If the agency contracts for development of the scope of work statement, the agency shall contract for architectural and engineering services as defined by and in accordance with the Brooks Architect-Engineers Act (40 U.S.C. 541 et seq.).

'(2) The contracting officer solicits phase-one proposals that—

- '(A) include information on the offeror's—
  - '(i) technical approach; and
  - '(ii) technical qualifications; and
- '(B) do not include—
  - '(i) detailed design information; or
  - '(ii) cost or price information.

'(3) The evaluation factors to be used in evaluating phase-one proposals are stated in the solicitation and include specialized experience and technical competence, capability to perform, past performance of the offeror's team (including the architect-engineer and construction members of the team) and other appropriate factors, except that cost-related or price-related evaluation factors are not permitted. Each solicitation establishes the relative importance assigned to the evaluation factors and subfactors that must be considered in the evaluation of phase-one proposals. The agency evaluates phase-one proposals on the basis of the phase-one evaluation factors set forth in the solicitation.

'(4) The contracting officer selects as the most highly qualified the number of offerors specified in the solicitation to provide the property or services under the contract and requests the selected offerors to submit phase-two competitive proposals that include technical proposals and cost or price information. Each solicitation establishes with respect to phase two—

- '(A) the technical submission for the proposal, including design concepts or proposed solutions to requirements addressed within the scope of work (or both), and

'(B) the evaluation factors and subfactors, including cost or price, that must be considered in the evaluations of proposals in accordance with paragraphs (2), (3), and (4) of section 2305(a) of this title.

The contracting officer separately evaluates the submissions described in subparagraphs (A) and (B).

'(5) The agency awards the contract in accordance with section 2305(b)(4) of this title.

'(d) SOLICITATION TO STATE NUMBER OF OFFERORS TO BE SELECTED FOR PHASE TWO REQUESTS FOR COMPETITIVE PROPOSALS- A solicitation issued pursuant to the procedures described in subsection (c) shall state the maximum number of offerors that are to be selected to submit competitive proposals pursuant to subsection (c)(4). The maximum number specified in the solicitation shall not exceed 5 unless the agency determines with respect to an individual solicitation that a specified number greater than 5 is in the Government's interest and is consistent with the purposes and objectives of the two-phase selection process.

'(e) REQUIREMENT FOR GUIDANCE AND REGULATIONS- The Federal Acquisition Regulation shall include guidance-

'(1) regarding the factors that may be considered in determining whether the two-phase contracting procedures authorized by subsection (a) are appropriate for use in individual contracting situations;

'(2) regarding the factors that may be used in selecting contractors; and

'(3) providing for a uniform approach to be used Government-wide.'

(2) The table of sections at the beginning of chapter 137 of such title is amended by adding after the item relating to section 2305 the following new item:

'2305a. Design-build selection procedures.'

(b) CIVILIAN AGENCY ACQUISITIONS- (1) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended by inserting after section 303L the following new section:

#### 'SEC. 303M. DESIGN-BUILD SELECTION PROCEDURES.

'(a) AUTHORIZATION- Unless the traditional acquisition approach of design-bid-build established under the Brooks Architect-Engineers Act (title IX of this Act) is used or another acquisition procedure authorized by law is used, the head of an executive agency shall use the two-phase selection procedures authorized in this section for entering into a contract for the design and construction of a public building, facility, or work when a determination is made under subsection (b) that the procedures are appropriate for use.

'(b) CRITERIA FOR USE- A contracting officer shall make a determination whether two-phase selection procedures are appropriate for use for entering into a contract for the design and construction of a public building, facility, or work when the contracting officer anticipates that three or more offers will be received for such contract, design work must be performed before an offeror can develop a price or cost proposal for such contract, the offeror will incur a substantial amount of expense in preparing the offer, and the contracting officer has considered information such as the following:

'(1) The extent to which the project requirements have been adequately defined.

'(2) The time constraints for delivery of the project.

'(3) The capability and experience of potential contractors.

'(4) The suitability of the project for use of the two-phase selection procedures.

'(5) The capability of the agency to manage the two-phase selection process.

'(6) Other criteria established by the agency.

'(c) PROCEDURES DESCRIBED- Two-phase selection procedures consist of the following:

'(1) The agency develops, either in-house or by contract, a scope of work statement for inclusion in the solicitation that defines the project and provides prospective offerors with sufficient information regarding the Government's requirements (which may include criteria and preliminary design, budget parameters, and schedule or delivery requirements) to enable the offerors to submit proposals which meet the Government's needs. If the agency contracts for development of the scope

of work statement, the agency shall contract for architectural and engineering services as defined by and in accordance with the Brooks Architect-Engineers Act (40 U.S.C. 541 et seq.).

'(2) The contracting officer solicits phase-one proposals that-

'(A) include information on the offeror's-

'(i) technical approach; and

'(ii) technical qualifications; and

'(B) do not include-

'(i) detailed design information; or

'(ii) cost or price information.

'(3) The evaluation factors to be used in evaluating phase-one proposals are stated in the solicitation and include specialized experience and technical competence, capability to perform, past performance of the offeror's team (including the architect-engineer and construction members of the team) and other appropriate factors, except that cost-related or price-related evaluation factors are not permitted. Each solicitation establishes the relative importance assigned to the evaluation factors and subfactors that must be considered in the evaluation of phase-one proposals. The agency evaluates phase-one proposals on the basis of the phase-one evaluation factors set forth in the solicitation.

'(4) The contracting officer selects as the most highly qualified the number of offerors specified in the solicitation to provide the property or services under the contract and requests the selected offerors to submit phase-two competitive proposals that include technical proposals and cost or price information. Each solicitation establishes with respect to phase two-

'(A) the technical submission for the proposal, including design concepts or proposed solutions to requirements addressed within the scope of work (or both); and

'(B) the evaluation factors and subfactors, including cost or price, that must be considered in the evaluations of proposals in accordance with subsections (b), (c), and (d) of section 303A. The contracting officer separately

evaluates the submissions described in subparagraphs (A) and (B).

'(5) The agency awards the contract in accordance with section 303B of this title.

'(d) SOLICITATION TO STATE NUMBER OF OFFERORS TO BE SELECTED FOR PHASE TWO REQUESTS FOR COMPETITIVE PROPOSALS- A solicitation issued pursuant to the procedures described in subsection (c) shall state the maximum number of offerors that are to be selected to submit competitive proposals pursuant to subsection (c)(4). The maximum number specified in the solicitation shall not exceed 5 unless the agency determines with respect to an individual solicitation that a specified number greater than 5 is in the Government's interest and is consistent with the purposes and objectives of the two-phase selection process.

'(e) REQUIREMENT FOR GUIDANCE AND REGULATIONS- The Federal Acquisition Regulation shall include guidance-

'(1) regarding the factors that may be considered in determining whether the two-phase contracting procedures authorized by subsection (a) are appropriate for use in individual contracting situations;

'(2) regarding the factors that may be used in selecting contractors; and

'(3) providing for a uniform approach to be used Government-wide.'

(2) The table of sections at the beginning of such Act is amended by inserting after the item relating to section 303L the following new item:

'Sec. 303M. Design-build selection procedures.'

#### TITLE XLII—COMMERCIAL ITEMS

##### 'SEC. 4201. COMMERCIAL ITEM EXCEPTION TO REQUIREMENT FOR CERTIFIED COST OR PRICING DATA.

(a) ARMED SERVICES ACQUISITIONS- (1) Subsections (b), (c), and (d) of section 2306a of title 10, United States Code, are amended to read as follows:

###### '(b) EXCEPTIONS-

'(1) IN GENERAL- Submission of certified cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or modification of a contract or subcontract-

'(A) for which the price agreed upon is based on-

- '(i) adequate price competition; or
  - '(ii) prices set by law or regulation;
  - '(B) for the acquisition of a commercial item; or
  - '(C) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination.
- '(2) MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS-**
- In the case of a modification of a contract or subcontract for a commercial item that is not covered by the exception to the submission of certified cost or pricing data in paragraph (1)(A) or (1)(B), submission of certified cost or pricing data shall not be required under subsection (a) if-
- '(A) the contract or subcontract being modified is a contract or subcontract for which submission of certified cost or pricing data may not be required by reason of paragraph (1)(A) or (1)(B); and
  - '(B) the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.
- '(c) COST OR PRICING DATA ON BELOW-THRESHOLD CONTRACTS-**
- '(1) AUTHORITY TO REQUIRE SUBMISSION-** Subject to paragraph (2), when certified cost or pricing data are not required to be submitted by subsection (a) for contract, subcontract, or modification of a contract or subcontract, such data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires such data to be submitted under this subsection, the head of the procuring activity shall justify in writing the reason for such requirement.
- '(2) EXCEPTION-** The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subparagraph (A) or (B) of subsection (b)(1).
- '(3) DELEGATION OF AUTHORITY PROHIBITED-** The head of a procuring activity may not delegate functions under this paragraph.
- '(d) SUBMISSION OF OTHER INFORMATION-**
- '(1) AUTHORITY TO REQUIRE SUBMISSION-** When certified cost or pricing data are not required to be submitted under this section for a contract, subcontract, or modification of a contract or subcontract, the contracting officer shall require submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract. Except in the case of a contract or subcontract covered by the exceptions in subsection (b)(1)(A), the data submitted shall include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price for the procurement.
- '(2) LIMITATIONS ON AUTHORITY-** The Federal Acquisition Regulation shall include the following provisions regarding the types of information that contracting officers may require under paragraph (1):
- '(A) Reasonable limitations on requests for sales data relating to commercial items.
  - '(B) A requirement that a contracting officer limit, to the maximum extent practicable, the scope of any request for information relating to commercial items from an offeror to only that information that is in the form regularly maintained by the offeror in commercial operations.
  - '(C) A statement that any information received relating to commercial items that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.'
- (2) Section 2306a of such title is further amended-
    - (A) by striking out subsection (h); and
    - (B) by redesignating subsection (i) as subsection (h).
  - (b) CIVILIAN AGENCY ACQUISITIONS- (1) Subsections (b), (c) and (d) of section 304A of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254b) are amended to read as follows:
- '(b) EXCEPTIONS-**
- '(1) IN GENERAL-** Submission of certified cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or a modification of a contract or subcontract-
- '(A) for which the price agreed upon is based on-
    - '(i) adequate price competition; or
    - '(ii) prices set by law or regulation;
  - '(B) for the acquisition of a commercial item; or
  - '(C) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination.
- '(2) MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS-**
- In the case of a modification of a contract or subcontract for a commercial item that is not covered by the exception to the submission of certified cost or pricing data in paragraph (1)(A) or (1)(B), submission of certified cost or pricing data shall not be required under subsection (a) if-
- '(A) the contract or subcontract being modified is a contract or subcontract for which submission of certified cost or pricing data may not be required by reason of paragraph (1)(A) or (1)(B); and
  - '(B) the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.
- '(c) COST OR PRICING DATA ON BELOW-THRESHOLD CONTRACTS-**
- '(1) AUTHORITY TO REQUIRE SUBMISSION-** Subject to paragraph (2), when certified cost or pricing data are not required to be submitted by subsection (a) for a contract, subcontract, or modification of a contract or subcontract, such data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires such data to be submitted under this subsection, the head of the procuring activity shall justify in writing the reason for such requirement.
- '(2) EXCEPTION-** The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subparagraph (A) or (B) of subsection (b)(1).
- '(3) DELEGATION OF AUTHORITY PROHIBITED-** The head of a procuring activity may not delegate the functions under this paragraph.
- '(d) SUBMISSION OF OTHER INFORMATION-**
- '(1) AUTHORITY TO REQUIRE SUBMISSION-** When certified cost or pricing data are not required to be submitted under this section for a contract, subcontract, or modification of a contract or subcontract, the contracting officer shall require submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract. Except in the case of a contract or subcontract covered by the exceptions in subsection (b)(1)(A), the data submitted shall include, at a minimum, appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price for the procurement.
- '(2) LIMITATIONS ON AUTHORITY-** The Federal Acquisition Regulation shall include the following provisions regarding the types of information that contracting officers may require under paragraph (1):

- '(A) Reasonable limitations on requests for sales data relating to commercial items.
  - '(B) A requirement that a contracting officer limit, to the maximum extent practicable, the scope of any request for information relating to commercial items from an offeror to only that information that is in the form regularly maintained by the offeror in commercial operations.
  - '(C) A statement that any information received relating to commercial items that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.'
- (2) Section 304A of such Act is further amended—  
 (A) by striking out subsection (h); and  
 (B) by redesignating subsection (i) as subsection (h).

#### **SEC. 4202. APPLICATION OF SIMPLIFIED PROCEDURES TO CERTAIN COMMERCIAL ITEMS.**

- (a) **ARMED SERVICES ACQUISITIONS-** (1) Section 2304(g) of title 10, United States Code, is amended—  
  - (A) in paragraph (1), by striking out 'shall provide for special simplified procedures for purchases of and all that follows through the end of the paragraph and inserting in lieu thereof the following: 'shall provide for—  
 '(A) special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold; and  
 '(B) special simplified procedures for purchases of property and services for amounts greater than the simplified acquisition threshold but not greater than \$5,000,000 with respect to which the contracting officer reasonably expects, based on the nature of the property or services sought and on market research, that offers will include only commercial items.'; and  
 (B) by adding at the end the following new paragraph:  
 '(4) The head of an agency shall comply with the Federal Acquisition Regulation provisions referred to in section 31(g) of the Office of Federal Procurement Policy Act (41 U.S.C. 427).'
  - (2) Section 2305 of title 10, United States Code, is amended in subsection (a)(2) by inserting after 'other than for' the following: 'a procurement for commercial items using special simplified procedures or'.
  - (b) **CIVILIAN AGENCY ACQUISITIONS-** (1) Section 303(g) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(g)) is amended—  
    - (A) in paragraph (1), by striking out 'shall provide for special simplified procedures for purchases of and all that follows through the end of the paragraph and inserting in lieu thereof the following: 'shall provide for—  
 '(A) special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold; and  
 '(B) special simplified procedures for purchases of property and services for amounts greater than the simplified acquisition threshold but not greater than \$5,000,000 with respect to which the contracting officer reasonably expects, based on the nature of the property or services sought and on market research, that offers will include only commercial items.'; and  
 (B) by adding at the end the following new paragraph:  
 '(5) An executive agency shall comply with the Federal Acquisition Regulation provisions referred to in section 31(g) of the Office of Federal Procurement Policy Act (41 U.S.C. 427).'
    - (2) Section 303A of such Act (41 U.S.C. 253a) is amended in subsection (b) by inserting after 'other than for' the following: 'a procurement for commercial items using special simplified procedures or'.
    - (c) **ACQUISITIONS GENERALLY-** Section 31 of the Office of Federal Procurement Policy Act (41 U.S.C. 427) is amended—  
      - (1) in subsection (a), by striking out 'shall provide for special simplified procedures for purchases of and all that follows through the end of the subsection and inserting in lieu thereof the following: 'shall provide for—  
 '(1) special simplified procedures for purchases of property and

services for amounts not greater than the simplified acquisition threshold; and  
 '(2) special simplified procedures for purchases of property and services for amounts greater than the simplified acquisition threshold but not greater than \$5,000,000 with respect to which the contracting officer reasonably expects, based on the nature of the property or services sought and on market research, that offers will include only commercial items.'; and  
 (2) by adding at the end the following new subsection:

- '(g) **SPECIAL RULES FOR COMMERCIAL ITEMS-** The Federal Acquisition Regulation shall provide that, in the case of a purchase of commercial items using special simplified procedures, an executive agency—

- '(1) shall publish a notice in accordance with section 18 and, as provided in subsection (b)(4) of such section, permit all responsible sources to submit a bid, proposal, or quotation (as appropriate) which shall be considered by the agency;
- '(2) may not conduct the purchase on a sole source basis unless the need to do so is justified in writing and approved in accordance with section 2304 of title 10, United States Code, or section 303 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253), as applicable; and
- '(3) shall include in the contract file a written description of the procedures used in awarding the contract and the number of offers received.'

- (d) **SIMPLIFIED NOTICE-** (1) Section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. 416) is amended—

- (A) in subsection (a)(6), by inserting before 'submission' the following: 'issuance of solicitations and the'; and
- (B) in subsection (b)(6), by striking out 'threshold-' and inserting in lieu thereof 'threshold, or a contract for the procurement of commercial items using special simplified procedures—'

- (e) **EFFECTIVE DATE-** The authority to issue solicitations for purchases of commercial items in excess of the simplified acquisition threshold pursuant to the special simplified procedures authorized by section 2304(g)(1) of title 10, United States Code, section 303(g)(1) of the Federal Property and Administrative Services Act of 1949, and section 31(a) of the Office of Federal Procurement Policy Act, as amended by this section, shall expire three years after the date on which such amendments take effect pursuant to section 4401(b). Contracts may be awarded pursuant to solicitations that have been issued

before such authority expires, notwithstanding the expiration of such authority.

#### **SEC. 4203. INAPPLICABILITY OF CERTAIN PROCUREMENT LAWS TO COMMERCIALLY AVAILABLE OFF-THE-SHELF ITEMS.**

- (a) **LAWS LISTED IN THE FAR-** The Office of Federal Procurement Policy Act (41 U.S.C. 401) et seq.) is amended by adding at the end the following:

#### **'SEC. 35. COMMERCIALLY AVAILABLE OFF-THE-SHELF ITEM ACQUISITIONS: LISTS OF INAPPLICABLE LAWS IN FEDERAL ACQUISITION REGULATION.**

- (a) **LISTS OF INAPPLICABLE PROVISIONS OF LAW-** (1) The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to contracts for the procurement of commercially available off-the-shelf items.

- (2) A provision of law that, pursuant to paragraph (3), is properly included on a list referred to in paragraph (1) may not be construed as being applicable to contracts referred to in paragraph (1). Nothing in this section shall be construed to render inapplicable to such contracts any provision of law that is not included on such list.

- (3) A provision of law described in subsection (b) shall be included on the list of inapplicable provisions of law required by paragraph (1) unless the Administrator for Federal Procurement Policy makes a written determination that it would not be in the best interest of the United States to exempt such contracts from the applicability of that provision of law. Nothing in this section shall be construed as modifying or superseding, or as being intended to impair or restrict authorities or responsibilities under—

- '(A) section 15 of the Small Business Act (15 U.S.C. 644); or  
 '(B) bid protest procedures developed under the authority of subchapter V of chapter 35 of title 31, United States Code; subsections (e) and (f)

of section 2305 of title 10, United States Code; or subsections (h) and (i) of section 303B of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253b).

(b) COVERED LAW- Except as provided in subsection (a)(3), the list referred to in subsection (a)(1) shall include each provision of law that, as determined by the Administrator, imposes on persons who have been awarded contracts by the Federal Government for the procurement of commercially available off-the-shelf items Government-unique policies, procedures, requirements, or restrictions for the procurement of property or services, except the following:

- (1) A provision of law that provides for criminal or civil penalties.
- (2) A provision of law that specifically refers to this section and provides that, notwithstanding this section, such provision of law shall be applicable to contracts for the procurement of commercial off-the-shelf items.

(c) DEFINITION- (1) As used in this section, the term 'commercially available off-the-shelf item' means, except as provided in paragraph (2), an item that-

- (A) is a commercial item (as described in section 4(12)(A));
  - (B) is sold in substantial quantities in the commercial marketplace; and
  - (C) is offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace.
- (2) The term 'commercially available off-the-shelf item' does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.
- (b) CLERICAL AMENDMENT- The table of contents in section 1(b) of such Act is amended by inserting after the item relating to section 34 the following:
- 'Sec. 35. Commercially available off-the-shelf item acquisitions: lists of inapplicable laws in Federal Acquisition Regulation.'

#### SEC. 4204. AMENDMENT OF COMMERCIAL ITEMS DEFINITION.

Section 4(12)(F) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)(F)) is amended by inserting 'or market' after 'catalog'.

#### SEC. 4205. INAPPLICABILITY OF COST ACCOUNTING STANDARDS TO CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS.

Paragraph (2)(B) of section 26(f) of the Office of Federal Procurement Policy Act (41 U.S.C. 422(f)) is amended-

- (1) by striking out clause (i) and inserting in lieu thereof the following:
  - (i) Contracts or subcontracts for the acquisition of commercial items.; and
- (2) by striking out clause (iii).

#### TITLE XLIII—ADDITIONAL REFORM PROVISIONS

##### Subtitle A—Additional Acquisition Reform Provisions

#### SEC. 4301. ELIMINATION OF CERTAIN CERTIFICATION REQUIREMENTS.

##### (a) ELIMINATION OF CERTAIN STATUTORY CERTIFICATION REQUIREMENTS-

- (1) Section 2410b of title 10, United States Code, is amended in paragraph (2) by striking out 'certification and'.
- (2) Section 1352(b)(2) of title 31, United States Code, is amended-
  - (A) by striking out subparagraph (C); and
  - (B) by inserting 'and' after the semicolon at the end of subparagraph (A).
- (3) Section 5152 of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701) is amended-
  - (A) in subsection (a)(1), by striking out 'has certified to the contracting agency that it will' and inserting in lieu thereof 'agrees to';
  - (B) in subsection (a)(2), by striking out 'contract includes a certification by the individual' and inserting in lieu thereof 'individual agrees'; and
  - (C) in subsection (b)(1)-
    - (i) by striking out subparagraph (A);
    - (ii) by redesignating subparagraph (B) as subparagraph (A) and in that subparagraph by striking out 'such certification by failing to carry out'; and
    - (iii) by redesignating subparagraph (C) as subparagraph (B).

##### (b) ELIMINATION OF CERTAIN REGULATORY CERTIFICATION REQUIREMENTS-

(1) CURRENT CERTIFICATION REQUIREMENTS- (A) Not later than 210 days after the date of the enactment of this Act, the Administrator for Federal Procurement Policy shall issue for public comment a proposal to amend the Federal Acquisition Regulation to remove from the Federal Acquisition Regulation certification requirements for contractors and offerors that are not specifically imposed by statute. The Administrator may omit such a certification requirement from the proposal only if-

- (i) the Federal Acquisition Regulatory Council provides the Administrator with a written justification for the requirement and a determination that there is no less burdensome means for administering and enforcing the particular regulation that contains the certification requirement; and
- (ii) the Administrator approves in writing the retention of the certification requirement.

(B) Not later than 210 days after the date of the enactment of this Act, the head of each executive agency that has agency procurement regulations containing one or more certification requirements for contractors and offerors that are not specifically imposed by statute shall issue for public comment a proposal to amend the regulations to remove the certification requirements. The head of the executive agency may omit such a certification requirement from the proposal only if-

- (I) the senior procurement executive for the executive agency provides the head of the executive agency with a written justification for the requirement and a determination that there is no less burdensome means for administering and enforcing the particular regulation that contains the certification requirement; and
- (II) the head of the executive agency approves in writing the retention of such certification requirement.

(ii) For purposes of clause (i), the term 'head of the executive agency' with respect to a military department means the Secretary of Defense.

(2) FUTURE CERTIFICATION REQUIREMENTS- (A) Section 29 of the Office of Federal Procurement Policy Act (41 U.S.C. 425) is amended-

- (i) by amending the heading to read as follows:

'SEC. 29. CONTRACT CLAUSES AND CERTIFICATIONS.'
- (ii) by inserting '(a) NONSTANDARD CONTRACT CLAUSES-' before 'The Federal Acquisition'; and
- (iii) by adding at the end the following new subsection:

(c) PROHIBITION ON CERTIFICATION REQUIREMENTS- (1) A requirement for a certification by a contractor or offeror may not be included in the Federal Acquisition Regulation unless-

(A) the certification requirement is specifically imposed by statute; or  
(B) written justification for such certification requirement is provided to the Administrator for Federal Procurement Policy by the Federal Acquisition Regulatory Council, and the Administrator approves in writing the inclusion of such certification requirement.

(2) A requirement for a certification by a contractor or offeror may not be included in a procurement regulation of an executive agency unless-

- (i) the certification requirement is specifically imposed by statute; or
- (ii) written justification for such certification requirement is provided to the head of the executive agency by the senior procurement executive of the agency, and the head of the executive agency approves in writing the inclusion of such certification requirement.

(3) For purposes of subparagraph (A), the term 'head of the executive agency' with respect to a military department means the Secretary of Defense.'

(B) The item relating to section 29 in the table of contents for the Office of Federal Procurement Policy Act (contained in section 1(b)) (41 U.S.C. 401 note) is amended to read as follows:

'Sec. 29. Contract clauses and certifications.'

(c) POLICY OF CONGRESS- Section 29 of the Office of Federal Procurement Policy Act (41 U.S.C. 425) is further amended by adding after subsection (a) the following new subsection:

(b) CONSTRUCTION OF CERTIFICATION REQUIREMENTS- A provision of law may not be construed as requiring a certification by a contractor or offeror in a procurement made or to be made by the Federal Government unless that provision of law specifically provides that such a certification shall be required.'

**SEC. 4302. AUTHORITIES CONDITIONED ON FACNET CAPABILITY.**

(a) COMMENCEMENT AND EXPIRATION OF AUTHORITY TO CONDUCT CERTAIN TESTS OF PROCUREMENT PROCEDURES- Subsection (j) of section 5061 of the Federal Acquisition Streamlining Act of 1994 (41 U.S.C. 413 note; 108 Stat. 3355) is amended to read as follows:

'(j) COMMENCEMENT AND EXPIRATION OF AUTHORITY- The authority to conduct a test under subsection (a) in an agency and to award contracts under such a test shall take effect on January 1, 1997, and shall expire on January 1, 2001. A contract entered into before such authority expires in an agency pursuant to a test shall remain in effect, in accordance with the terms of the contract, notwithstanding expiration of the authority to conduct the test under this section.'

(b) USE OF SIMPLIFIED ACQUISITION PROCEDURES- Subsection (e) of section 31 of the Office of Federal Procurement Policy Act (41 U.S.C. 427) is amended-

- (1) by striking out 'ACQUISITION PROCEDURES-' and all that follows through '(B) The simplified acquisition' in paragraph (2)(B) and inserting in lieu thereof 'ACQUISITION PROCEDURES- The simplified acquisition'; and
- (2) by striking out 'pursuant to this section' in the remaining text and inserting in lieu thereof 'pursuant to section 2304(g)(1)(A) of title 10, United States Code, section 303(g)(1)(A) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(g)(1)(A)), and subsection (a)(1) of this section'.

**SEC. 4303. INTERNATIONAL COMPETITIVENESS.**

(a) ADDITIONAL AUTHORITY TO WAIVE RESEARCH, DEVELOPMENT, AND PRODUCTION COSTS- Subject to subsection (b), section 21(e)(2) of the Arms Export Control Act (22 U.S.C. 2761(e)(2)) is amended-

- (1) by inserting '(A)' after '(2)'; and
- (2) by adding at the end the following new subparagraphs:

'(B) The President may waive the charge or charges which would otherwise be considered appropriate under paragraph (1)(B) for a particular sale if the President determines that-

- (i) imposition of the charge or charges likely would result in the loss of the sale; or
- (ii) in the case of a sale of major defense equipment that is also being procured for the use of the Armed Forces, the waiver of the charge or charges would (through a resulting increase in the total quantity of the equipment purchased from the source of the equipment that causes a reduction in the unit cost of the equipment) result in a savings to the United States on the cost of the equipment procured for the use of the Armed Forces that substantially offsets the revenue foregone by reason of the waiver of the charge or charges.

'(C) The President may waive, for particular sales of major defense equipment, any increase in a charge or charges previously considered appropriate under paragraph (1)(B) if the increase results from a correction of an estimate (reasonable when made) of the production quantity base that was used for calculating the charge or charges for purposes of such paragraph.'

(b) CONDITIONS- Subsection (a) shall be effective only if-

- (1) the President, in the budget of the President for fiscal year 1997, proposes legislation that if enacted would be qualifying offsetting legislation; and
- (2) there is enacted qualifying offsetting legislation.

(c) EFFECTIVE DATE- If the conditions in subsection (b) are met, then the amendments made by subsection (a) shall take effect on the date of the enactment of qualifying offsetting legislation.

(d) DEFINITIONS- For purposes of this section:

- (1) The term 'qualifying offsetting legislation' means legislation that includes provisions that-
  - (A) offset fully the estimated revenues lost as a result of the amendments made by subsection (a) for each of the fiscal years 1997 through 2005;
  - (B) expressly state that they are enacted for the purpose of the offset described in subparagraph (A); and
  - (C) are included in full on the PayGo scorecard.
- (2) The term 'PayGo scorecard' means the estimates that are made by the Director of the Congressional Budget Office and the Director of the

Office of Management and Budget under section 252(d) of the Balanced Budget and Emergency Deficit Control Act of 1985.

**SEC. 4304. PROCUREMENT INTEGRITY.**

(a) AMENDMENT OF PROCUREMENT INTEGRITY PROVISION- Section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) is amended to read as follows:

**'SEC. 27. RESTRICTIONS ON DISCLOSING AND OBTAINING CONTRACTOR BID OR PROPOSAL INFORMATION OR SOURCE SELECTION INFORMATION.**

'(a) PROHIBITION ON DISCLOSING PROCUREMENT INFORMATION- (1) A person described in paragraph (2) shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.

'(2) Paragraph (1) applies to any person who-

'(A) is a present or former officer or employee of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement; and

'(B) by virtue of that office, employment, or relationship has or had access to contractor bid or proposal information or source selection information.

'(b) PROHIBITION ON OBTAINING PROCUREMENT INFORMATION- A person shall not, other than as provided by law, knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.

'(c) ACTIONS REQUIRED OF PROCUREMENT OFFICERS WHEN CONTACTED BY OFFERORS REGARDING NON-FEDERAL EMPLOYMENT- (1) If an agency employee who is participating personally and substantially in a Federal agency procurement for a contract in excess of the simplified acquisition threshold contacts or is contacted by a person who is a bidder or offeror in that Federal agency procurement regarding possible non-Federal employment for that employee, the employee shall-

'(A) promptly report the contact in writing to the employee's supervisor and to the designated agency ethics official (or designee) of the agency in which the employee is employed; and

'(B)(i) reject the possibility of non-Federal employment; or

'(ii) disqualify himself or herself from further personal and substantial participation in that Federal agency procurement until such time as the agency has authorized the employee to resume participation in such procurement, in accordance with the requirements of section 208 of title 18, United States Code, and applicable agency regulations on the grounds that-

'(I) the person is no longer a bidder or offeror in that Federal agency procurement; or

'(II) all discussions with the bidder or offeror regarding possible non-Federal employment have terminated without an agreement or arrangement for employment.

'(2) Each report required by this subsection shall be retained by the agency for not less than two years following the submission of the report. All such reports shall be made available to the public upon request, except that any part of a report that is exempt from the disclosure requirements of section 552 of title 5, United States Code, under subsection (b)(1) of such section may be withheld from disclosure to the public.

'(3) An employee who knowingly fails to comply with the requirements of this subsection shall be subject to the penalties and administrative actions set forth in subsection (e).

'(4) A bidder or offeror who engages in employment discussions with an employee who is subject to the restrictions of this subsection, knowing that the employee has not complied with subparagraph (A) or (B) of paragraph (1), shall be subject to the penalties and administrative actions set forth in subsection (e).

'(d) PROHIBITION ON FORMER EMPLOYEE'S ACCEPTANCE OF COMPENSATION FROM CONTRACTOR- (1) A former employee of a Federal agency may not accept compensation from a contractor as an employee, officer, director, or consultant of the contractor within a period of one year after such former employee-

'(A) served, at the time of selection of the contractor or the award of a contract to that contractor, as the procuring contracting officer, the source selection authority, a member of the source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of \$10,000,000;

'(B) served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of \$10,000,000 awarded to that contractor; or

'(C) personally made for the Federal agency-

- '(i) a decision to award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order in excess of \$10,000,000 to that contractor;
- '(ii) a decision to establish overhead or other rates applicable to a contract or contracts for that contractor that are valued in excess of \$10,000,000;
- '(iii) a decision to approve issuance of a contract payment or payments in excess of \$10,000,000 to that contractor; or
- '(iv) a decision to pay or settle a claim in excess of \$10,000,000 with that contractor.

'(2) Nothing in paragraph (1) may be construed to prohibit a former employee of a Federal agency from accepting compensation from any division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract referred to in subparagraph (A), (B), or (C) of such paragraph.

'(3) A former employee who knowingly accepts compensation in violation of this subsection shall be subject to penalties and administrative actions as set forth in subsection (e).

'(4) A contractor who provides compensation to a former employee knowing that such compensation is accepted by the former employee in violation of this subsection shall be subject to penalties and administrative actions as set forth in subsection (e).

'(5) Regulations implementing this subsection shall include procedures for an employee or former employee of a Federal agency to request advice from the appropriate designated agency ethics official regarding whether the employee or former employee is or would be precluded by this subsection from accepting compensation from a particular contractor.

'(e) PENALTIES AND ADMINISTRATIVE ACTIONS-

'(1) CRIMINAL PENALTIES- Whoever engages in conduct constituting a violation of subsection (a) or (b) for the purpose of either-

- '(A) exchanging the information covered by such subsection for anything of value, or
- '(B) obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract,

shall be imprisoned for not more than 5 years or fined as provided under title 18, United States Code, or both.

'(2) CIVIL PENALTIES- The Attorney General may bring a civil action in an appropriate United States district court against any person who engages in conduct constituting a violation of subsection (a), (b), (c), or (d). Upon proof of such conduct by a preponderance of the evidence, the person is subject to a civil penalty. An individual who engages in such conduct is subject to a civil penalty of not more than \$50,000 for each violation plus twice the amount of compensation which the individual received or offered for the prohibited conduct. An organization that engages in such conduct is subject to a civil penalty of not more than \$500,000 for each violation plus twice the amount of compensation which the organization received or offered for the prohibited conduct.

'(3) ADMINISTRATIVE ACTIONS- (A) If a Federal agency receives information that a contractor or a person has engaged in conduct constituting a violation of subsection (a), (b), (c), or (d), the Federal agency shall consider taking one or more of the following actions, as appropriate:

- '(i) Cancellation of the Federal agency procurement, if a contract has not yet been awarded.
- '(ii) Rescission of a contract with respect to which-

'(I) the contractor or someone acting for the contractor has

been convicted for an offense punishable under paragraph (1), or

'(II) the head of the agency that awarded the contract has determined, based upon a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting such an offense.

'(iii) Initiation of suspension or debarment proceedings for the protection of the Government in accordance with procedures in the Federal Acquisition Regulation.

'(iv) Initiation of adverse personnel action, pursuant to the procedures in chapter 75 of title 5, United States Code, or other applicable law or regulation.

'(B) If a Federal agency rescinds a contract pursuant to subparagraph (A)(ii), the United States is entitled to recover, in addition to any penalty prescribed by law, the amount expended under the contract.

'(C) For purposes of any suspension or debarment proceedings initiated pursuant to subparagraph (A)(iii), engaging in conduct constituting an offense under subsection (a), (b), (c), or (d) affects the present responsibility of a Government contractor or subcontractor.

'(f) DEFINITIONS- As used in this section:

'(1) The term 'contractor bid or proposal information' means any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

- '(A) Cost or pricing data (as defined by section 2306a(h) of title 10, United States Code, with respect to procurements subject to that section, and section 304A(h) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254b(h)), with respect to procurements subject to that section).
- '(B) Indirect costs and direct labor rates.
- '(C) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.
- '(D) Information marked by the contractor as 'contractor bid or proposal information', in accordance with applicable law or regulation.

'(2) The term 'source selection information' means any of the following information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

- '(A) Bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices before public bid opening.
- '(B) Proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices.
- '(C) Source selection plans.
- '(D) Technical evaluation plans.
- '(E) Technical evaluations of proposals.
- '(F) Cost or price evaluations of proposals.
- '(G) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.
- '(H) Rankings of bids, proposals, or competitors.
- '(I) The reports and evaluations of source selection panels, boards, or advisory councils.
- '(J) Other information marked as 'source selection information' based on a case-by-case determination by the head of the agency, his designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

'(3) The term 'Federal agency' has the meaning provided such term in section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472).

'(4) The term 'Federal agency procurement' means the acquisition (by using competitive procedures and awarding a contract) of goods or services (including construction) from non-Federal sources by a Federal agency using appropriated funds.

'(5) The term 'contracting officer' means a person who, by appointment

in accordance with applicable regulations, has the authority to enter into a Federal agency procurement contract on behalf of the Government and to make determinations and findings with respect to such a contract.

(6) The term 'protest' means a written objection by an interested party to the award or proposed award of a Federal agency procurement contract, pursuant to subchapter V of chapter 35 of title 31, United States Code.

(g) LIMITATION ON PROTESTS- No person may file a protest against the award or proposed award of a Federal agency procurement contract alleging a violation of subsection (a), (b), (c), or (d), nor may the Comptroller General of the United States consider such an allegation in deciding a protest, unless that person reported to the Federal agency responsible for the procurement, no later than 14 days after the person first discovered the possible violation, the information that the person believed constitutes evidence of the offense.

(h) SAVINGS PROVISIONS- This section does not-

- (1) restrict the disclosure of information to, or its receipt by, any person or class of persons authorized, in accordance with applicable agency regulations or procedures, to receive that information;
- (2) restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information;
- (3) restrict the disclosure or receipt of information relating to a Federal agency procurement after it has been canceled by the Federal agency before contract award unless the Federal agency plans to resume the procurement;
- (4) prohibit individual meetings between a Federal agency employee and an offeror or potential offeror for, or a recipient of, a contract or subcontract under a Federal agency procurement, provided that unauthorized disclosure or receipt of contractor bid or proposal information or source selection information does not occur;
- (5) authorize the withholding of information from, nor restrict its receipt by, Congress, a committee or subcommittee of Congress, the Comptroller General, a Federal agency, or an inspector general of a Federal agency;
- (6) authorize the withholding of information from, nor restrict its receipt by, the Comptroller General of the United States in the course of a protest against the award or proposed award of a Federal agency procurement contract; or
- (7) limit the applicability of any requirements, sanctions, contract penalties, and remedies established under any other law or regulation.'

(b) REPEALS- The following provisions of law are repealed:

- (1) Sections 2397, 2397a, 2397b, and 2397c of title 10, United States Code.
- (2) Section 33 of the Federal Energy Administration Act of 1974 (15 U.S.C. 789).
- (3) Section 281 of title 18, United States Code.
- (4) Subsection (c) of section 32 of the Office of Federal Procurement Policy Act (41 U.S.C. 428).
- (5) The first section 19 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5918).
- (6) Part A of title VI of the Department of Energy Organization Act and its catchline (42 U.S.C. 7211, 7212, and 7218).
- (7) Section 308 of the Energy Research and Development Administration Appropriation Authorization Act for Fiscal Year 1977 (42 U.S.C. 5816a).
- (8) Section 522 of the Energy Policy and Conservation Act (42 U.S.C. 6392).

(c) CLERICAL AMENDMENTS-

- (1) The table of sections at the beginning of chapter 141 of title 10, United States Code, is amended by striking out the items relating to sections 2397, 2397a, 2397b, and 2397c.
- (2) The table of sections at the beginning of chapter 15 of title 18, United States Code, is amended by striking out the item relating to section 281.
- (3) Section 32 of the Office of Federal Procurement Policy Act (41 U.S.C. 428) is amended by redesignating subsections (d), (e), (f), and (g) as subsections (c), (d), (e), and (f), respectively.
- (4) The table of contents for the Department of Energy Organization Act is amended by striking out the items relating to part A of title VI including sections 601 through 603.
- (5) The table of contents for the Energy Policy and Conservation Act is amended by striking out the item relating to section 522.

#### SEC. 4305. FURTHER ACQUISITION STREAMLINING PROVISIONS.

(a) PURPOSE OF OFFICE OF FEDERAL PROCUREMENT POLICY-  
(1) REVISED STATEMENT OF PURPOSE- Section 5(a) of the Office of Federal

Procurement Policy Act (41 U.S.C. 404) is amended to read as follows:

'(a) There is in the Office of Management and Budget an Office of Federal Procurement Policy (hereinafter referred to as the 'Office') to provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies and to promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government.'

(2) REPEAL OF FINDINGS, POLICIES, AND PURPOSES- Sections 2 and 3 of

such Act (41 U.S.C. 401 and 402) are repealed.

(b) REPEAL OF REPORT REQUIREMENT- Section 8 of the Office of Federal Procurement Policy Act (41 U.S.C. 407) is repealed.

(c) OBSOLETE PROVISIONS-

(1) RELATIONSHIP TO FORMER REGULATIONS- Section 10 of the Office of

Federal Procurement Policy Act (41 U.S.C. 409) is repealed.

(2) AUTHORIZATION OF APPROPRIATIONS- Section 11 of such Act (41 U.S.C.

410) is amended to read as follows:

#### 'SEC. 11. AUTHORIZATION OF APPROPRIATIONS.

'There is authorized to be appropriated for the Office of Federal Procurement Policy each fiscal year such sums as may be necessary for carrying out the responsibilities of that office for such fiscal year.'

(d) CLERICAL AMENDMENTS- The table of contents for the Office of Federal Procurement Policy Act (contained in section 1(b)) is amended by striking out the items relating to sections 2, 3, 8, and 10.

#### SEC. 4306. VALUE ENGINEERING FOR FEDERAL AGENCIES.

(a) USE OF VALUE ENGINEERING- The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), as amended by section 4203, is further amended by adding at the end the following new section:

#### 'SEC. 36. VALUE ENGINEERING.

(a) IN GENERAL- Each executive agency shall establish and maintain cost-effective value engineering procedures and processes.

(b) DEFINITION- As used in this section, the term 'value engineering' means an analysis of the functions of a program, project, system, product, item of equipment, building, facility, service, or supply of an executive agency, performed by qualified agency or contractor personnel, directed at improving performance, reliability, quality, safety, and life cycle costs.'

(b) CLERICAL AMENDMENT- The table of contents for such Act, contained in section 1(b), is amended by adding at the end the following new item:

'Sec. 36. Value engineering.'

#### SEC. 4307. ACQUISITION WORKFORCE.

(a) ACQUISITION WORKFORCE- (1) The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), as amended by section 4306, is further amended by adding at the end the following new section:

#### 'SEC. 37. ACQUISITION WORKFORCE.

(a) APPLICABILITY- This section does not apply to an executive agency that is subject to chapter 87 of title 10, United States Code.

(b) MANAGEMENT POLICIES-

(1) POLICIES AND PROCEDURES- The head of each executive agency, after consultation with the Administrator for Federal Procurement Policy, shall establish policies and procedures for the effective management (including accession, education, training, career development, and performance incentives) of the acquisition workforce of the agency. The development of acquisition workforce policies under this section shall be carried out consistent with the merit system principles set forth in section 2301(b) of title 5, United States Code.

(2) UNIFORM IMPLEMENTATION- The head of each executive agency shall ensure that, to the maximum extent practicable, acquisition workforce policies and procedures established are uniform in their implementation throughout the agency.

(3) GOVERNMENT-WIDE POLICIES AND EVALUATION- The

Administrator shall issue policies to promote uniform implementation of this section by executive agencies, with due regard for differences in program requirements among agencies that may be appropriate and warranted in view of the agency mission. The Administrator shall coordinate with the Deputy Director for Management of the Office of Management and Budget to ensure that such policies are consistent with the policies and procedures established and enhanced system of incentives provided pursuant to section 5051(c) of the Federal Acquisition Streamlining Act of 1994 (41 U.S.C. 263 note). The Administrator shall evaluate the implementation of the provisions of this section by executive agencies.

(c) SENIOR PROCUREMENT EXECUTIVE AUTHORITIES AND RESPONSIBILITIES- Subject to the authority, direction, and control of the head of an executive agency, the senior procurement executive of the agency shall carry out all powers, functions, and duties of the head of the agency with respect to implementation of this section. The senior procurement executive shall ensure that the policies of the head of the executive agency established in accordance with this section are implemented throughout the agency.

(d) MANAGEMENT INFORMATION SYSTEMS- The Administrator shall ensure that the heads of executive agencies collect and maintain standardized information on the acquisition workforce related to implementation of this section. To the maximum extent practicable, such data requirements shall conform to standards established by the Office of Personnel Management for the Central Personnel Data File.

(e) APPLICABILITY TO ACQUISITION WORKFORCE- The programs established by this section shall apply to the acquisition workforce of each executive agency. For purposes of this section, the acquisition workforce of an agency consists of all employees serving in acquisition positions listed in subsection (g)(1)(A).

(f) CAREER DEVELOPMENT-

(1) CAREER PATHS- The head of each executive agency shall ensure that appropriate career paths for personnel who desire to pursue careers in acquisition are identified in terms of the education, training, experience, and assignments necessary for career progression to the most senior acquisition positions. The head of each executive agency shall make information available on such career paths.

(2) CRITICAL DUTIES AND TASKS- For each career path, the head of each executive agency shall identify the critical acquisition-related duties and tasks in which, at minimum, employees of the agency in the career path shall be competent to perform at full performance grade levels. For this purpose, the head of the executive agency shall provide appropriate coverage of the critical duties and tasks identified by the Director of the Federal Acquisition Institute.

(3) MANDATORY TRAINING AND EDUCATION- For each career path, the head of each executive agency shall establish requirements for the completion of course work and related on-the-job training in the critical acquisition-related duties and tasks of the career path. The head of each executive agency shall also encourage employees to maintain the currency of their acquisition knowledge and generally enhance their knowledge of related acquisition management disciplines through academic programs and other self-developmental activities.

(4) PERFORMANCE INCENTIVES- The head of each executive agency shall provide for an enhanced system of incentives for the encouragement of excellence in the acquisition workforce which rewards performance of employees that contribute to achieving the agency's performance goals. The system of incentives shall include provisions that-

(A) relate pay to performance (including the extent to which the performance of personnel in such workforce contributes to achieving the cost goals, schedule goals, and performance goals established for acquisition programs pursuant to section 313(b) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 263(b))); and

(B) provide for consideration, in personnel evaluations and promotion decisions, of the extent to which the performance of personnel in such workforce contributes to achieving such cost goals, schedule goals, and performance goals.

(g) QUALIFICATION REQUIREMENTS-

(1) IN GENERAL- (A) Subject to paragraph (2), the Administrator shall establish qualification requirements, including education requirements,

for the following positions:

- '(i) Entry-level positions in the General Schedule Contracting series (GS-1102).
- '(ii) Senior positions in the General Schedule Contracting series (GS-1102).
- '(iii) All positions in the General Schedule Purchasing series (GS-1105).
- '(iv) Positions in other General Schedule series in which significant acquisition-related functions are performed.

'(B) Subject to paragraph (2), the Administrator shall prescribe the manner and extent to which such qualification requirements shall apply to any person serving in a position described in subparagraph (A) at the time such requirements are established.

'(2) RELATIONSHIP TO REQUIREMENTS APPLICABLE TO DEFENSE ACQUISITION WORKFORCE- The Administrator shall establish qualification requirements and make prescriptions under paragraph (1) that are comparable to those established for the same or equivalent positions pursuant to chapter 87 of title 10, United States Code, with appropriate modifications.

'(3) APPROVAL OF REQUIREMENTS- The Administrator shall submit any requirement established or prescription made under paragraph (1) to the Director of the Office of Personnel Management for approval. If the Director does not disapprove a requirement or prescription within 30 days after the date on which the Director receives it, the requirement or prescription is deemed to be approved by the Director.

(h) EDUCATION AND TRAINING-

'(1) FUNDING LEVEL- (A) The head of an executive agency shall set forth separately the funding levels requested for education and training of the acquisition workforce in the budget justification documents submitted in support of the President's budget submitted to Congress under section 1105 of title 31, United States Code.

'(B) Funds appropriated for education and training under this section may not be obligated for any other purpose.

'(2) TUITION ASSISTANCE- The head of an executive agency may provide tuition reimbursement in education (including a full-time course of study leading to a degree) in accordance with section 4107 of title 5, United States Code, for personnel serving in acquisition positions in the agency.'

(2) The table of contents for such Act, contained in section 1(b), is amended by adding at the end the following new item:

'Sec. 37. Acquisition workforce.'

(b) ADDITIONAL AMENDMENTS- Section 6(d) of the Office of Federal Procurement Policy Act (41 U.S.C. 405), is amended-

(1) by redesignating paragraphs (6), (7), (8), (9), (10), (11), and (12) (as transferred by section 4321(h)(1)) as paragraphs (7), (8), (9), (10), (11), (12), and (13), respectively;

(2) in paragraph (5)-

(A) in subparagraph (A), by striking out 'Government-wide career management programs for a professional procurement work force' and inserting in lieu thereof 'the development of a professional acquisition workforce Government-wide'; and

(B) in subparagraph (B)-

(i) by striking out 'procurement by the' and inserting in lieu thereof 'acquisition by the';

(ii) by striking out 'and' at the end of the subparagraph; and

(iii) by striking out subparagraph (C) and inserting in lieu thereof the following:

'(C) collect data and analyze acquisition workforce data from the Office of Personnel Management, the heads of executive agencies, and, through periodic surveys, from individual employees;

'(D) periodically analyze acquisition career fields to identify critical competencies, duties, tasks, and related academic prerequisites, skills, and knowledge;

'(E) coordinate and assist agencies in identifying and recruiting highly qualified candidates for acquisition fields;

'(F) develop instructional materials for acquisition personnel in coordination with private and public acquisition colleges and training facilities;

'(G) evaluate the effectiveness of training and career development programs for acquisition personnel;

'(H) promote the establishment and utilization of academic programs

- by colleges and universities in acquisition fields;
- (I) facilitate, to the extent requested by agencies, interagency intern and training programs; and
  - (J) perform other career management or research functions as directed by the Administrator; and
- (3) by inserting before paragraph (7) (as so redesignated) the following new paragraph (6):

(6) administering the provisions of section 37;'

#### **SEC. 4308. DEMONSTRATION PROJECT RELATING TO CERTAIN PERSONNEL MANAGEMENT POLICIES AND PROCEDURES.**

(a) COMMENCEMENT- The Secretary of Defense is encouraged to take such steps as may be necessary to provide for the commencement of a demonstration project, the purpose of which would be to determine the feasibility or desirability of one or more proposals for improving the personnel management policies or procedures that apply with respect to the acquisition workforce of the Department of Defense.

(b) TERMS AND CONDITIONS-

(1) IN GENERAL- Except as otherwise provided in this subsection, any demonstration project described in subsection (a) shall be subject to section 4703 of title 5, United States Code, and all other provisions of such title that apply with respect to any demonstration project under such section.

(2) EXCEPTIONS- Subject to paragraph (3), in applying section 4703 of title 5, United States Code, with respect to a demonstration project described in subsection (a)-

(A) '180 days' in subsection (b)(4) of such section shall be deemed to read '120 days';

(B) '90 days' in subsection (b)(6) of such section shall be deemed to read '30 days'; and

(C) subsection (d)(1)(A) of such section shall be disregarded.

(3) CONDITION- Paragraph (2) shall not apply with respect to a demonstration project unless it-

(A) involves only the acquisition workforce of the Department of Defense (or any part thereof); and

(B) commences during the 3-year period beginning on the date of the enactment of this Act.

(c) DEFINITION- For purposes of this section, the term 'acquisition workforce' refers to the persons serving in acquisition positions within the Department of Defense, as designated pursuant to section 1721(a) of title 10, United States Code.

#### **SEC. 4309. COOPERATIVE PURCHASING.**

(a) DELAY IN OPENING CERTAIN FEDERAL SUPPLY SCHEDULES TO USE BY STATE, LOCAL, AND INDIAN TRIBAL GOVERNMENTS- The Administrator of General Services may not use the authority of section 201(b)(2) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 481(b)(2)) to provide for the use of Federal supply schedules of the General Services Administration until after the later of-

(1) the date on which the 18-month period beginning on the date of the enactment of this Act expires; or

(2) the date on which all of the following conditions are met:

(A) The Administrator has considered the report of the Comptroller General required by subsection (b).

(B) The Administrator has submitted comments on such report to Congress as required by subsection (c).

(C) A period of 30 days after the date of submission of such comments to Congress has expired.

(b) REPORT- Not later than one year after the date of the enactment of this Act, the Comptroller General shall submit to the Administrator of General Services and to Congress a report on the implementation of section 201(b) of the Federal Property and Administrative Services Act of 1949. The report shall include the following:

(1) An assessment of the effect on industry, including small businesses and local dealers, of providing for the use of Federal supply schedules by the entities described in section 201(b)(2)(A) of the Federal Property and Administrative Services Act of 1949.

(2) An assessment of the effect on such entities of providing for the use of Federal supply schedules by them.

(c) COMMENTS ON REPORT BY ADMINISTRATOR- Not later than 30 days after receiving the report of the Comptroller General required by subsection (b), the Administrator of General Services shall submit to Congress comments on the report, including the Administrator's comments on whether the Administrator plans to provide any Federal supply schedule for the use of any entity described in section 201(b)(2)(A) of the Federal Property and Administrative Services Act of 1949.

(d) CALCULATION OF 30-DAY PERIOD- For purposes of subsection (a)(2)(C), the calculation of the 30-day period shall exclude Saturdays, Sundays, and holidays, and any day on which neither House of Congress is in session because of an adjournment sine die, a recess of more than 3 days, or an adjournment of more than 3 days.

#### **SEC. 4310. PROCUREMENT NOTICE TECHNICAL AMENDMENT.**

Section 18(c)(1)(E) of the Office of Federal Procurement Policy Act (41 U.S.C. 416(c)(1)(E)) is amended by inserting after 'requirements contract' the following: ', a task order contract, or a delivery order contract'.

#### **SEC. 4311. MICRO-PURCHASES WITHOUT COMPETITIVE QUOTATIONS.**

Section 32(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 428), as redesignated by section 4304(c)(3), is amended by striking out 'the contracting officer' and inserting in lieu thereof 'an employee of an executive agency or a member of the Armed Forces of the United States authorized to do so'.

#### **Subtitle B—Technical Amendments**

##### **SEC. 4321. AMENDMENTS RELATED TO FEDERAL ACQUISITION STREAMLINING ACT OF 1994.**

(a) PUBLIC LAW 103-355- Effective as of October 13, 1994, and as if included therein as enacted, the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355; 108 Stat. 3243 et seq.) is amended as follows:

(1) Section 1073 (108 Stat. 3271) is amended by striking out 'section 303I' and inserting in lieu thereof 'section 303K'.

(2) Section 1202(a) (108 Stat. 3274) is amended by striking out the closing quotation marks and second period at the end of paragraph (2)(B) of the subsection inserted by the amendment made by that section.

(3) Section 1251(b) (108 Stat. 3284) is amended by striking out 'Office of Federal Procurement Policy Act' and inserting in lieu thereof 'Federal Property and Administrative Services Act of 1949'.

(4) Section 2051(e) (108 Stat. 3304) is amended by striking out the closing quotation marks and second period at the end of subsection (f)(3) in the matter inserted by the amendment made by that section.

(5) Section 2101(a)(6)(B)(ii) (108 Stat. 3308) is amended by replacing 'regulation' with 'regulations' in the first quoted matter.

(6) Section 2351(a) (108 Stat. 3322) is amended by inserting '(1)' before 'Section 6'.

(7) The heading of section 2352(b) (108 Stat. 3322) is amended by striking out 'PROCEDURES TO SMALL BUSINESS GOVERNMENT CONTRACTORS-' and inserting in lieu thereof 'PROCEDURES-'.

(8) Section 3022 (108 Stat. 3333) is amended by striking out 'each place' and all that follows through the end of the section and inserting in lieu thereof 'in paragraph (1) and ', rent,' after 'sell' in paragraph (2)'.

(9) Section 5092(b) (108 Stat. 3362) is amended by inserting 'of paragraph (2)' after 'second sentence'.

(10) Section 6005(a) (108 Stat. 3364) is amended by striking out the closing quotation marks and second period at the end of subsection (e)(2) of the matter inserted by the amendment made by that section.

(11) Section 10005(f)(4) (108 Stat. 3409) is amended in the second matter in quotation marks by striking out 'SEC. 5. This Act' and inserting in lieu thereof 'SEC. 7. This title'.

(b) TITLE 10, UNITED STATES CODE- Title 10, United States Code, is amended as follows:

(1) Section 2220(b) is amended by striking out 'the date of the enactment of the Federal Acquisition Streamlining Act of 1994' and inserting in lieu thereof 'October 13, 1994'.

(2)(A) The section 2247 added by section 7202(a)(1) of Public Law 103-355 (108 Stat. 3379) is redesignated as section 2249.

(B) The item relating to that section in the table of sections at the beginning of subchapter I of chapter 134 is revised to conform to the

- redesignation made by subparagraph (A).
- (3) Section 2302(3)(K) is amended by adding a period at the end.
- (4) Section 2304(f)(2)(D) is amended by striking out 'the Act of June 25, 1938 (41 U.S.C. 46 et seq.), popularly referred to as the Wagner-O'Day Act,' and inserting in lieu thereof 'the Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.).'.
- (5) Section 2304(h) is amended by striking out paragraph (1) and inserting in lieu thereof the following:
- '(1) The Walsh-Healey Act (41 U.S.C. 35 et seq.).'.
- (6)(A) The section 2304a added by section 848(a)(1) of Public Law 103-160 (107 Stat. 1724) is redesignated as section 2304e.
- (B) The item relating to that section in the table of sections at the beginning of chapter 137 is revised to conform to the redesignation made by subparagraph (A).
- (7) Section 2306a is amended—
- (A) in subsection (d)(2)(A)(ii), by inserting 'to' after 'The information referred';
  - (B) in subsection (e)(4)(B)(ii), by striking out the second comma after 'parties'; and
  - (C) in subsection (i)(3), by inserting '(41 U.S.C. 403(12))' before the period at the end.
- (8) Section 2323 is amended—
- (A) in subsection (a)(1)(C), by inserting a closing parenthesis after '1135d-5(3))' and after '1059c(b)(1))';
  - (B) in subsection (a)(3), by striking out '(issued under' and all that follows through '421(c))';
  - (C) in subsection (b), by inserting '(1)' after 'AMOUNT -'; and
  - (D) in subsection (i)(3), by adding at the end a subparagraph (D) identical to the subparagraph (D) set forth in the amendment made by section 811(e) of Public Law 103-160 (107 Stat. 1702).
- (9) Section 2324 is amended—
- (A) in subsection (e)(2)(C)—
    - (i) by striking out 'awarding the contract' at the end of the first sentence; and
    - (ii) by striking out 'Title III' and all that follows through 'Act' and inserting in lieu thereof 'the Buy American Act (41 U.S.C. 10b-1)'; and
  - (B) in subsection (h)(2), by inserting 'the head of the agency or after 'in the case of any contract if'.
- (10) Section 2350b is amended—
- (A) in subsection (c)(1)—
    - (i) by striking out 'specifically-' and inserting in lieu thereof 'specifically prescribes-'; and
    - (ii) by striking out 'prescribe' in each of subparagraphs (A), (B), (C), and (D); and
  - (B) in subsection (d)(1), by striking out 'subcontract to be' and inserting in lieu thereof 'subcontract be'.
- (11) Section 2372(i)(1) is amended by striking out 'section 2324(m)' and inserting in lieu thereof 'section 2324(l)'.
- (12) Section 2384(b) is amended—
- (A) in paragraph (2)—
    - (i) by striking 'items, as' and inserting in lieu thereof 'items (as'; and
    - (ii) by inserting a closing parenthesis after '403(12))'; and
  - (B) in paragraph (3), by inserting a closing parenthesis after '403(11))'.
- (13) Section 2400(a)(5) is amended by striking out 'the preceding sentence' and inserting in lieu thereof 'this paragraph'.
- (14) Section 2405 is amended—
- (A) in paragraphs (1) and (2) of subsection (a), by striking out 'the date of the enactment of the Federal Acquisition Streamlining Act of 1994' and inserting in lieu thereof 'October 13, 1994'; and
  - (B) in subsection (c)(3)—
    - (i) by striking out 'the later of-' and all that follows through '(B)'; and
    - (ii) by redesignating clauses (i), (ii), and (iii) as subparagraphs (A), (B), and (C), respectively, and realigning those subparagraphs accordingly.
- (15) Section 2410d(b) is amended by striking out paragraph (3).
- (16) Section 2410g(d)(1) is amended by inserting before the period at the end the following: '(as defined in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)))'.
- (17) Section 2424(c) is amended—
- (A) by inserting 'EXCEPTION-' after '(c)'; and
  - (B) by striking out 'drink' the first and third places it appears in the second sentence and inserting in lieu thereof 'beverage'.
- (18) Section 2431 is amended—
- (A) in subsection (b)—
    - (i) by striking out 'Any report' in the first sentence and inserting in lieu thereof 'Any documents'; and
    - (ii) by striking out 'the report' in paragraph (3) and inserting in lieu thereof 'the documents'; and
  - (B) in subsection (c), by striking 'reporting' and inserting in lieu thereof 'documentation'.
- (19) Section 2461(e)(1) is amended by striking out 'the Act of June 25, 1938 (41 U.S.C. 47)', popularly referred to as the Wagner-O'Day Act' and inserting in lieu thereof 'the Javits-Wagner-O'Day Act (41 U.S.C. 47)'.
- (20) Section 2533(a) is amended by striking out 'title III of the Act' and all that follows through 'such Act' and inserting in lieu thereof 'the Buy American Act (41 U.S.C. 10a)) whether application of such Act'.
- (21) Section 2662(b) is amended by striking out 'small purchase threshold' and inserting in lieu thereof 'simplified acquisition threshold'.
- (22) Section 2701(i)(1) is amended—
- (A) by striking out 'Act of August 24, 1935 (40 U.S.C. 270a-270d), commonly referred to as the 'Miller Act,' and inserting in lieu thereof 'Miller Act (40 U.S.C. 270a et seq.)'; and
  - (B) by striking out 'such Act of August 24, 1935' and inserting in lieu thereof 'the Miller Act'.
- (c) SMALL BUSINESS ACT- The Small Business Act (15 U.S.C. 632 et seq.) is amended as follows:
- (1) Section 8(d) (15 U.S.C. 637(d)) is amended—
    - (A) in paragraph (1), by striking out the second comma after 'small business concerns' the first place it appears; and
    - (B) in paragraph (6)(C), by striking out 'and small business concerns owned and controlled by the socially and economically disadvantaged individuals' and inserting in lieu thereof 'small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women'.
  - (2) Section 8(f) (15 U.S.C. 637(f)) is amended by inserting 'and' after the semicolon at the end of paragraph (5).
  - (3) Section 15(g)(2) (15 U.S.C. 644(g)(2)) is amended by striking out the second comma after the first appearance of 'small business concerns'.
- (d) TITLE 31, UNITED STATES CODE- Title 31, United States Code, is amended as follows:
- (1) Section 3551 is amended—
    - (A) by striking out 'subchapter-' and inserting in lieu thereof 'subchapter'; and
    - (B) in paragraph (2), by striking out 'or proposed contract' and inserting in lieu thereof 'or a solicitation or other request for offers'.
  - (2) Section 3553(b)(3) is amended by striking out '3554(a)(3)' and inserting in lieu thereof '3554(a)(4)'.
  - (3) Section 3554(b)(2) is amended by striking out 'section 3553(d)(2)(A)(i)' and inserting in lieu thereof 'section 3553(d)(3)(C)(i)(I)'.
- (e) FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949- The Federal Property and Administrative Services Act of 1949 is amended as follows:
- (1) The table of contents in section 1 (40 U.S.C. 471 prec.) is amended—
    - (A) by striking out the item relating to section 104;
    - (B) by striking out the item relating to section 201 and inserting in lieu thereof the following:
- 'Sec. 201. Procurements, warehousing, and related activities.';

- (C) by inserting after the item relating to section 315 the following new item:
- 'Sec. 316. Merit-based award of grants for research and development.'
- (D) by striking out the item relating to section 603 and inserting in lieu thereof the following:
- 'Sec. 603. Authorizations for appropriations and transfer authority.'
- and
- (E) by inserting after the item relating to section 605 the following new item:
- 'Sec. 606. Sex discrimination.'
- (2) Section 303(f)(2)(D) (41 U.S.C. 253(f)(2)(D)) is amended by striking out 'the Act of June 25, 1938 (41 U.S.C. 46 et seq.), popularly referred to as the Wagner-O'Day Act' and inserting in lieu thereof 'the Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.).'
- (3) The heading for paragraph (1) of section 304A(c) (41 U.S.C. 254b(c)) is amended by changing each letter that is capitalized (other than the first letter of the first word) to lower case.
- (4) Subsection (d)(2)(A)(ii) of section 304A (41 U.S.C. 254b) is amended by inserting 'to' after 'The information referred'.
- (5) Section 304C(a)(2) is amended by striking out 'section 304B' and inserting in lieu thereof 'section 304A'.
- (6) Section 307(b) is amended by striking out 'section 305(c)' and inserting in lieu thereof 'section 305(d)'.
- (7) The heading for section 314A (41 U.S.C. 264a) is amended to read as follows:

#### **'SEC. 314A. DEFINITIONS RELATING TO PROCUREMENT OF COMMERCIAL ITEMS.'**

- (8) Section 315(b) (41 U.S.C. 265(b)) is amended by striking out 'inspector general' both places it appears and inserting in lieu thereof 'Inspector General'.
- (9) The heading for section 316 (41 U.S.C. 266) is amended by inserting at the end a period.
- (f) WALSH-HEALEY ACT-
- (1) The Walsh-Healey Act (41 U.S.C. 35 et seq.) is amended—
- (A) by transferring the second section 11 (as added by section 7201(4) of Public Law 103-355) so as to appear after section 10; and
- (B) by redesignating the three sections following such section 11 (as so transferred) as sections 12, 13, and 14.
- (2) Such Act is further amended in section 10—
- (A) in subsection (b), by striking out 'section 1(b)' and inserting in lieu thereof 'section 1(a)'; and
- (B) in subsection (c), by striking out the comma after 'locality'.
- (g) ANTI-KICKBACK ACT OF 1986- Section 7(d) of the Anti-Kickback Act of 1986 (41 U.S.C. 57(d)) is amended—
- (1) by striking out 'such Act' and inserting in lieu thereof 'the Office of Federal Procurement Policy Act'; and
- (2) by striking out the second period at the end.
- (h) OFFICE OF FEDERAL PROCUREMENT POLICY ACT- The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) is amended as follows:
- (1) Section 6 (41 U.S.C. 405) is amended by transferring paragraph (12) of subsection (d) (as such paragraph was redesignated by section 5091(2) of the Federal Acquisition Streamlining Act of 1994 (P.L. 103-355; 108 Stat. 3361)) to the end of that subsection.
- (2) Section 6(11) (41 U.S.C. 405(11)) is amended by striking out 'small business' and inserting in lieu thereof 'small businesses'.
- (3) Section 18(b) (41 U.S.C. 416(b)) is amended by inserting 'and' after the semicolon at the end of paragraph (5).
- (4) Section 26(f)(3) (41 U.S.C. 422(f)(3)) is amended in the first sentence by striking out 'Not later than 180 days after the date of enactment of this section, the Administrator' and inserting in lieu thereof 'The Administrator'.
- (i) OTHER LAWS-
- (1) The National Defense Authorization Act for Fiscal Year 1994 (Public Law 103-160) is amended as follows:
- (A) Section 126(c) (107 Stat. 1567) is amended by striking out 'section 2401 of title 10, United States Code, or section 9081 of the Department of Defense Appropriations Act, 1990 (10 U.S.C. 2401 note)' and inserting in lieu thereof 'section 2401 or 2401a of

- title 10, United States Code.'
- (B) Section 127 (107 Stat. 1568) is amended—
- (i) in subsection (a), by striking out 'section 2401 of title 10, United States Code, or section 9081 of the Department of Defense Appropriations Act, 1990 (10 U.S.C. 2401 note)' and inserting in lieu thereof 'section 2401 or 2401a of title 10, United States Code'; and
- (ii) in subsection (e), by striking out 'section 9081 of the Department of Defense Appropriations Act, 1990 (10 U.S.C. 2401 note)' and inserting in lieu thereof 'section 2401a of title 10, United States Code'.
- (2) The National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189) is amended by striking out section 824.
- (3) Section 117 of the National Defense Authorization Act, Fiscal Year 1989 (Public Law 100-456; 10 U.S.C. 2431 note) is amended by striking out subsection (c).
- (4) The National Defense Authorization Act for Fiscal Years 1988 and 1989 (Public Law 100-180) is amended by striking out section 825 (10 U.S.C. 2432 note).
- (5) Section 11 of Public Law 101-552 (5 U.S.C. 581 note) is amended by inserting 'under' before 'the amendments made by this Act'.
- (6) The last sentence of section 6 of the Federal Power Act (16 U.S.C. 799) is repealed.
- (7) Section 101(a)(11)(A) of the Rehabilitation Act of 1973 (29 U.S.C. 721(a)(11)(A)) is amended by striking out 'the Act entitled 'An Act to create a Committee on Purchases of Blind-made Products, and for other purposes', approved June 25, 1938 (commonly known as the Wagner-O'Day Act; 41 U.S.C. 46 et seq.)' and inserting in lieu thereof 'the Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.)'.
- (8) The first section 5 of the Miller Act (40 U.S.C. 270a note) is redesignated as section 7 and, as so redesignated, is transferred to the end of that Act.
- (9) Section 3737(g) of the Revised Statutes of the United States (41 U.S.C. 15(g)) is amended by striking out 'rights of obligations' and inserting in lieu thereof 'rights or obligations'.
- (10) The Act of June 15, 1940 (41 U.S.C. 20a; Chapter 367; 54 Stat. 398), is repealed.
- (11) The Act of November 28, 1943 (41 U.S.C. 20b; Chapter 328; 57 Stat. 592), is repealed.
- (12) Section 3741 of the Revised Statutes of the United States (41 U.S.C. 22), as amended by section 6004 of Public Law 103-355 (108 Stat. 3364), is amended by striking out 'No member' and inserting in lieu thereof 'SEC. 3741. No Member'.
- (13) Section 5152(a)(1) of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701(a)(1)) is amended by striking out 'as defined in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403)' and inserting in lieu thereof '(as defined in section 4(12) of such Act (41 U.S.C. 403(12)))'.
- SEC. 4322. MISCELLANEOUS AMENDMENTS TO FEDERAL ACQUISITION LAWS.**
- (a) OFFICE OF FEDERAL PROCUREMENT POLICY ACT- The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) is amended as follows:
- (1) Section 6(b) (41 U.S.C. 405(b)) is amended by striking out the second comma after 'under subsection (a)' in the first sentence.
- (2) Section 25(b)(2) (41 U.S.C. 421(b)(2)) is amended by striking out 'Under Secretary of Defense for Acquisition' and inserting in lieu thereof 'Under Secretary of Defense for Acquisition and Technology'.
- (b) OTHER LAWS-
- (1) Section 11(2) of the Inspector General Act of 1978 (5 U.S.C. App.) is amended by striking out the second comma after 'Community Service'.
- (2) Section 908(e) of the Defense Acquisition Improvement Act of 1986 (10 U.S.C. 2326 note) is amended by striking out 'section 2325(g)' and inserting in lieu thereof 'section 2326(g)'.
- (3) Effective as of August 9, 1989, and as if included therein as enacted, Public Law 101-73 is amended in section 501(b)(1)(A) (103 Stat. 393) by striking out 'be,' and inserting in lieu thereof 'be,' in the

second quoted matter therein.

(4) Section 3732(a) of the Revised Statutes of the United States (41 U.S.C. 11(a)) is amended by striking out the second comma after 'quarters'.

(5) Section 2 of the Contract Disputes Act of 1978 (41 U.S.C. 601) is amended in paragraphs (3), (5), (6), and (7), by striking out 'The' and inserting in lieu thereof 'the'.

(6) Section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) is amended in subsections (d) and (e) by inserting after 'United States Code' each place it appears the following: '(as in effect on September 30, 1995)'.

(7) Section 13 of the Contract Disputes Act of 1978 (41 U.S.C. 612) is amended—

(A) in subsection (a), by striking out 'section 1302 of the Act of July 27, 1956, (70 Stat. 694, as amended; 31 U.S.C. 724a)' and inserting in lieu thereof 'section 1304 of title 31, United States Code'; and

(B) in subsection (c), by striking out 'section 1302 of the Act of July 27, 1956, (70 Stat. 694, as amended; 31 U.S.C. 724a)' and inserting in lieu thereof 'section 1304 of title 31, United States Code.'

division shall be construed to require the renegotiation or modification of contracts in existence on the date of the enactment of this Act.

(3) CONTINUED APPLICABILITY OF PREEXISTING LAW- Except as otherwise provided in this division, a law amended by this division shall continue to be applied according to the provisions thereof as such law was in effect on the day before the date of the enactment of this Act until—

- (A) the date specified in final regulations implementing the amendment of that law (as promulgated pursuant to this section); or
- (B) if no such date is specified in regulations, January 1, 1997.

## TITLE XLIV-EFFECTIVE DATES AND IMPLEMENTATION

### SEC. 4401. EFFECTIVE DATE AND APPLICABILITY.

(a) EFFECTIVE DATE- Except as otherwise provided in this division, this division and the amendments made by this division shall take effect on the date of the enactment of this Act.

#### (b) APPLICABILITY OF AMENDMENTS-

(1) SOLICITATIONS, UNSOLICITED PROPOSALS, AND RELATED CONTRACTS- An amendment made by this division shall apply, in the manner prescribed in the final regulations promulgated pursuant to section 4402 to implement such amendment, with respect to any solicitation that is issued, any unsolicited proposal that is received, and any contract entered into pursuant to such a solicitation or proposal, on or after the date described in paragraph (3).

(2) OTHER MATTERS- An amendment made by this division shall also apply, to the extent and in the manner prescribed in the final regulations promulgated pursuant to section 4402 to implement such amendment, with respect to any matter related to—

- (A) a contract that is in effect on the date described in paragraph (3);
- (B) an offer under consideration on the date described in paragraph (3); or
- (C) any other proceeding or action that is ongoing on the date described in paragraph (3).

(3) DEMARCTION DATE- The date referred to in paragraphs (1) and (2) is the date specified in such final regulations. The date so specified shall be January 1, 1997, or any earlier date that is not within 30 days after the date on which such final regulations are published.

### SEC. 4402. IMPLEMENTING REGULATIONS.

(a) PROPOSED REVISIONS- Proposed revisions to the Federal Acquisition Regulation and such other proposed regulations (or revisions to existing regulations) as may be necessary to implement this Act shall be published in the Federal Register not later than 210 days after the date of the enactment of this Act.

(b) PUBLIC COMMENT- The proposed regulations described in subsection (a) shall be made available for public comment for a period of not less than 60 days.

(c) FINAL REGULATIONS- Final regulations shall be published in the Federal Register not later than 330 days after the date of enactment of this Act.

(d) MODIFICATIONS- Final regulations promulgated pursuant to this section to implement an amendment made by this Act may provide for modification of an existing contract without consideration upon the request of the contractor.

#### (e) Savings Provisions-

(1) VALIDITY OF PRIOR ACTIONS- Nothing in this division shall be construed to affect the validity of any action taken or any contract entered into before the date specified in the regulations pursuant to section 4401(b)(3) except to the extent and in the manner prescribed in such regulations.

(2) RENEGOTIATION AND MODIFICATION OF PREEXISTING CONTRACTS- Except as specifically provided in this division, nothing in this

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